(1)

No. 94-6187-CFY
Status: GRANTED

Title: Steven Kurt Witte, Petitioner
v.
United States

Docketed:
September 21, 1994

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Dahlin II,Roland E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 20 1994		Order extending time to file response to petition until November 25, 1994.
5	Nov 22 1994		Brief of respondent United States in opposition filed.
7	Dec 1 1994		DISTRIBUTED. January 6, 1995 (Page 8)
9	Jan 6 1995		Petition GRANTED.
			**********
10	Jan 23 1995		Record filed.
		*	Record proceedings U.S. Court of Appeals, Fifth Circuit;record excerpts U.S.District Court, S.Dist. Texas.
11	Feb 2 1995		SET FOR ARGUMENT MONDAY, APRIL 17,1995. (2ND CASE).
13	Feb 8 1995		Joint appendix filed.
12	Feb 10 1995		Record filed.
		*	Original record proceedings United States District Court, Southern District of Texas (BOX) (3 SEALED ENVELOPES)
14	Feb 21 1995		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
15	Feb 21 1995		Brief of petitioner Steven Kirt Witte filed.
16	Mar 3 1995		CIRCULATED.
17	Mar 24 1995	X	Brief of respondent United States filed.
18	Apr 10 1995	X	Reply brief of petitioner filed.
19	Apr 17 1995		ARGUED.

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NO. 94-6187

Supreme Court, U.S.
FILED
1994
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

STEVEN KURT WITTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Attorney of Record

THOMAS S. BERG
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 310
Post Office Box 61508
Houston, Texas 77208-1508
Telephone: (713) 238-9600

NO. _____

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STEVEN KURT WITTE,
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UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Steven Kurt Witte, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), in the United States District Court for the Southern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
September 21, 1994

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Attorney of Record

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SUPREME COURT, U.S.

THOMAS S. BERG
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 310
Post Office Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

QUESTION PRESENTED

Does a government prosecution and punishment for an offense violate the double jeopardy clause if it already was included in relevant conduct for sentencing under the federal sentencing guidelines in a different and final prosecution?

TABLE OF CONTENTS

	Page
Question Presented	i
Does a government prosecution and punishment for an offense violate the double jeopardy clause if it already was included in relevant conduct for sentencing under the federal sentencing guidelines in a different and final prosecution?	
Table of Contents	ii
Table of Authorities	iii
Prayer	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Course of Proceedings	3
Statement of the Facts	5
Offense Conduct	5
The Two Indictments	6
Basis of Federal Jurisdiction	8
Reasons for Granting the Writ	8
Conclusion	14
Appendix A: Op., United States v. Wittie, No. 93-2245 (5th Cir. 1994)	15
Appendix B: Order Dismissing Indictment, United States v. Witte, Cr. No. H-92-207 (S.D. Tex. February 24, 1993)	29

TABLE OF AUTHORITIES

Page

CASES

North Carolina v. Pearce, 395 U.S. 711 (1969) 8

United States v. Brown, 1994 U.S. App. LEXIS 19766 *28-36 (7th Cir. August 1, 1994) 10

United States v. Cruce, 21 F.3d 70 n. 8 . . . . . 9, 10

United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695, 1705 (1992) 10-12

United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) 11, 12

United States v. Wittie, 25 F.3d 250 n.1 (5th Cir. 1994) . . . . . passim

Williams v. Oklahoma, 358 U.S. 576 (1959) 9

CONSTITUTION

U. S. Const. amend. V . . . . . passim

STATUTES

21 U.S.C. § 952 8

21 U.S.C. § 960 8

21 U.S.C. § 963 8

28 U.S.C. § 1254(1) 1

SENTENCING GUIDELINES

U.S.S.G. § 1B1.3(a)(2) 2, 10, 11

U.S.S.G. § 2D1.1, comment. n. 6 11

U.S.S.G. § 2F1.1, comment. n. 6 11

U.S.S.G. § 3D1.2(d) 2, 11

U.S.S.G. § 5G1.3(b) . . . . . passim

U.S.S.G. § 5K1.1 . . . . . 3, 6, 7

PRAYER

The petitioner, Steven Kurt Witte, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued June 23, 1994.

OPINIONS BELOW

On June 23, 1994, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the district court's order dismissing the indictment in this case. United States v. Wittie, No. 93-2245. A copy of that opinion is attached as Appendix A. The case is officially reported at 25 F.3d 250 (5th Cir. 1994).

A copy of the district court's order dismissing the indictment is attached as Appendix B.

JURISDICTION

On June 23, 1994, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the order of the district court which dismissed the indictment in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution of the United States provides in part that --

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.

U. S. Const., amend. V.

Section 1B1.3(a)(2) of the United States Sentencing Guidelines (Relevant Conduct) provides in part that --

> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, [the offense level shall be determined on the basis of] all acts and omissions described . . . above that were part of the same course of conduct or common scheme or plan as the offense of conviction.

U.S.S.G. § 1B1.3(a)(2).

Section 5G1.3(b) of the United States Sentencing Guidelines provides in part that --

> If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(b).

STATEMENT OF THE CASE

Course of Proceedings

In March 1991, Steven Kurt Witte[1], the petitioner, together with Sam Richard Kelly, was indicted for conspiracy to possess with intent to distribute marijuana, and aiding and abetting a knowing attempt to possess marijuana. Mr. Witte pleaded guilty to the aiding and abetting charge and agreed to cooperate with the government in exchange for the government's promise to dismiss the conspiracy charge and to file a motion under U.S.S.G. § 5K1.1 if Mr. Witte were to provide substantial assistance. Mr. Witte's cooperation caused Mr. Kelly to plead guilty.

Over objection by both the government and Mr. Witte, the district court included over 500 kilograms of cocaine from a related but as yet uncharged offense as 'relevant conduct' to be considered with the 375 pounds of marijuana in establishing a base offense level. This raised the guideline imprisonment range from 63 to 78 months, to 292 to 365 months. The district court granted the government's § 5K1.1 motion and departed downward to a sentence of 144 months.

The government then indicted Mr. Witte and Tom Pokorny for conspiracy and aiding and abetting an attempt to import the cocaine which had been included as relevant conduct for the marijuana

---

[1] The interested parties to this case are the United States of America and Steven Kurt Witte. Although the court of appeals case is styled United States v. Wittie, the correct spelling of the petitioner's surname is Witte. United States v. Wittie, 25 F.3d 250, 252 n.1 (5th Cir. 1994).

conviction and sentence. Mr. Witte moved to dismiss the indictment because (1) he already had been punished for the cocaine offense and (2) the indictment breached the earlier plea agreement. The district court dismissed the indictment on the double jeopardy ground.

On the government's appeal, the United States Court of Appeals for the Fifth Circuit reversed, holding that the double jeopardy clause did not preclude the second prosecution and punishment even though the acts underlying the second prosecution had been fully taken into account as relevant conduct in the first prosecution. United States v. Wittie, 25 F.3d 250, 261 (5th Cir. 1994). The court noted that its decision was in conflict with opinions from the Second and Tenth Circuits. Id. at 255 n. 18.

STATEMENT OF FACTS

Offense Conduct

In August 1989, an undercover agent of the Drug Enforcement Administration (DEA), Roger Norman, began negotiations with Dennis Mason in Tucson, Arizona, to import marijuana from Mexico into the United States. The first discussions were fruitless but contact resumed in June 1990, in Houston, Texas, between Agent Norman, Mason, and two new players, Tom Pokorny and Steven Kurt Witte. Mason, Pokorny, and Witte proposed to import marijuana from Mexico and cocaine from Guatemala; Agent Norman's job was to fly the drugs into the United States.

In July 1990, the Mexican drug source told them that cocaine might be added to or substituted for the marijuana shipments depending upon space and availability. By August 1990, Agent Norman was told that 4,400 pounds of marijuana was in Mexico for shipment. When Agent Gordon received the coordinates for the landing strip in Mexico, he arranged for the Mexican authorities to raid the operation. On August 12, 1990, Mason was arrested with several other people. Instead of finding marijuana, the authorities seized 591 kilograms of cocaine. Agent Norman told Witte the next day that his pilot had been unable to land because Mexican police had shown up on the airstrip. Plans between Agent Norman and Witte were placed on hold.

Although Pokorny's whereabouts were unknown, Agent Norman contacted Witte in January 1991, to see whether Witte would purchase 1,000 pounds of marijuana with a $50,000 downpayment.

Agent Norman still had possession of Witte's horse trailer from the earlier plans; Witte asked that it be returned to be used as a load vehicle for the marijuana. Additionally, Witte offered to bring a motor home belonging to Sam Kelly in Denver, Colorado, as an additional load vehicle.

On February 7, 1991, although Witte could produce only $25,000 of the downpayment, Agent Norman agreed to deliver to him and to Kelly the 1,000 pounds of marijuana. Undercover officers loaded the marijuana into the vehicles, and when Witte and Kelly took possession, they were arrested.[2]

The Two Indictments

The government first indicted Witte and Kelly for the "sting" marijuana from February 1991, charging conspiracy and attempted possession of marijuana with intent to distribute. Witte pleaded guilty to the attempted possession charge, which carried a penalty range of 5 to 40 years, in exchange for his agreement to cooperate in the case and to provide truthful information about any other offense about which he might be questioned. The government promised to move for a downward departure under U.S.S.G. § 5K1.1 if Witte provided substantial assistance and to further recommend a three-year cap if he aided them in locating Pokorny. Witte did not help to locate Pokorny, but Kelly, as a result of Witte's cooperation, decided to plead guilty.

When the district court sentenced Witte, it not only took into

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[2] The parties stipulated to 375 pounds of marijuana in the plea agreement. 25 F.3d at 253 n. 2.

account the 375 pounds of marijuana from the February 1991 "sting," but it also added as relevant conduct the more than 500 kilograms of cocaine from the August 1990 Mexican seizure. Both Witte and the government argued unavailingly that the cocaine should not be considered. The addition of the cocaine boosted Witte's guideline imprisonment range from 63 to 78 months, to 292 to 365 months.

The district court granted the government's Section 5K1.1 motion and departed to a sentence of 144 months based on Witte's cooperation via-a-vis Kelly. This sentence was still greater than the sentence available had Witte been punished only for the marijuana. Witte failed to perfect an appeal from this sentence.

The government brought a second indictment against Witte and Pokorny for conspiracy and attempted importation of the August 1990 cocaine. This indictment, before a different district judge of the same court, was dismissed on Witte's motion claiming that it violated the prohibition against double jeopardy and breached the plea agreement in the first case. Witte principally claimed that inclusion of the cocaine as relevant conduct in the first case was punishment for the cocaine which precluded a subsequent prosecution for the cocaine. The Fifth Circuit reversed the order of the district court and directed the reinstatement of the indictment, holding, inter alia, that inclusion of the cocaine as relevant conduct, even if considered punishment under double jeopardy analysis, was nevertheless intended by Congress and authorized via U.S.S.G. § 5G1.3(b). United States v. Wittie, 25 F.3d 250, 257-61 (5th Cir. 1994).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution by the United States alleging violations of Sections 952, 960 and 963 of Title 21, United States Code.

REASONS FOR GRANTING THE WRIT

> The Court of Appeals for the Fifth Circuit has decided an important question of federal law -- whether conduct which has been fully accounted for as additional punishment under the relevant conduct provisions of the sentencing guidelines may be the subject of a second prosecution and punishment -- which directly and intolerably conflicts with decisions of the Second and Tenth Circuits holding that full inclusion of the acts as relevant conduct for sentencing in one prosecution precludes a subsequent prosecution for those acts.

The double jeopardy clause of the fifth amendment protects against both multiple prosecutions and multiple punishments for the "same offense." United States v. Wittie, 25 F.3d 250, 254 (5th Cir. 1994), (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). This prosecution violates double jeopardy by exposing Mr. Witte to "multiple punishments" for the same act (i.e., conspiring and attempting to import cocaine).

The Fifth Circuit -- It Is Multiple Punishment But It Is Authorized

In United States v. Wittie the Fifth Circuit held that the double jeopardy clause was not violated when Mr. Witte was prosecuted for offense conduct (the cocaine offense) which had been fully accounted for as relevant conduct in a different, prior and final prosecution (the marijuana offense). 25 F.3d at 260.

Relying on this Court's comment in Williams v. Oklahoma, 358 U.S. 576, 585 (1959), that a sentencing judge "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime," the court determined that "the double use of single acts" apparently is permitted. 25 F.3d at 258.[3]

The Fifth Circuit recognized that "[t]he "real offense" approach [of the Sentencing Guidelines] to relevant conduct, however, may well lead to the conclusion that Witte was "punished" for the cocaine offense." 25 F.3d at 257.[4] Accepting analytically that there was a second punishment, the court went on to find that a second punishment was authorized by Congress. 25 F.3d at 258-62. The court noted that the commentary to section 5G1.3(b), application note 2, permits a defendant to be sentenced for different offenses that were part of the "same course of conduct". 25 F.3d 259 (emphasis in original). The court divined Congress's specific intent to permit limited multiple punishment by reading

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[3] The petitioner in Williams made a broad, unsuccessful due process challenge to the means in which his death sentence was imposed after his plea of guilty to a kidnapping charge. 358 U.S. at 581. He previously had been convicted for the murder of the kidnapping victim and had received a life sentence. 358 U.S. at 578. Williams failed to preserve a claim of double jeopardy by not raising it in the trial court. 358 U.S. at 585. Justice Douglas nevertheless dissented on the view that Williams was "in substance" twice tried for murder in violation of the guarantee against double jeopardy. 358 U.S. at 587.

[4] The Wittie court noted that in an earlier Fifth Circuit case, "Cruce expressly states that consideration of relevant conduct does not punish defendants for relevant conduct so considered but for the offense of conviction." 25 F.3d 259 n. 45, citing United States v. Cruce, 21 F.3d 70, 75 n. 8.

section 5G1.3(b) in pari materia with the command from section 1B1.3(a) that a defendant's sentence "must be determined on the basis of all relevant conduct,". 25 F.3d at 260.[5] One other opinion of the Fifth Circuit and a recent opinion from the Seventh Circuit align with this reasoning.[6]

The Tenth and Second Circuits --
Congress Intended to Preclude Second Prosecutions

The Tenth Circuit and the Second Circuit have held that a prosecution and sentence such as Mr. Witte faces violates double jeopardy. The Tenth Circuit considered this issue in United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S.Ct. 1695, 1705 (1992). In his first prosecution, Mr. Koonce was convicted for distributing "443 grams of [methamphetamine] he had mailed to [his cohort]." 945 F.2d at 1147. The district court sentenced Mr. Koonce, however, for 7,869 grams -- the 443 grams proved at trial plus 963 grams found at his home and 6,463 grams sold on other occasions. These additional amounts were included as

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[5] This limited concurrent sentence is of no help to Mr. Witte because, after his offense level was determined in the first prosecution, he received a downward departure to 144 months under section 5K1.1 for substantial assistance in the marijuana case. The effect of that downward departure is nullified if he is sentenced in the cocaine case to a concurrent but unreduced sentence of between 292 and 365 months imprisonment. The court suggests that the "harsh impact" of double punishment for the cocaine is "ameliorated" by giving Mr. Witte a concurrent sentence with credit under section 5G1.3(b) for time he has already served. Id. at 261.

[6] See United States v. Cruce, 21 F.3d 70 (5th Cir. 1994) and United States v. Brown, 1994 U.S. App. LEXIS 19766 *28-36 (7th Cir. August 1, 1994) (relying on Cruce).

"relevant conduct" under section 1B1.3, and they increased Mr. Koonce's offense level under the Guidelines. Id. at 1150.

The government then brought a second indictment charging Mr. Koonce with the 963 grams found at his home. The Tenth circuit rejected this attempt to punish the same conduct twice because it violated double jeopardy and contravened the legislative intent behind the creation of the Sentencing Guidelines. Id. at 1150-52.[7]

In United States v. McCormick, 992 F.2d 437 (2d Cir. 1993), the Second Circuit affirmed the dismissal of bank fraud charges that were used as relevant conduct in a prior case to compute and increase the defendant's offense level. The Second Circuit found that Congress's purpose in enacting the Sentencing Guidelines was to reduce the possibility of inconsistent sentences and arbitrary charging, especially with respect to determining a single punishment for "a set of similar acts [which] is specifically called for in cases of fraud."[8] Id. at 440-41.

Mr. McCormick was convicted after a trial in the District of Connecticut of a $75,000 bank fraud but was sentenced for $4 million of relevant conduct, an additional eight-step increase in

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[7] The Tenth Circuit did not have the current version of Section 5G1.3(b) when it decided Koonce. Wittie, 25 F.3d at 260.

[8] See U.S.S.G. § 2F1.1, comment. n. 6 ("the cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level ...."). Similarly, in drug cases U.S.S.G. § 2D1.1, comment. n. 6 provides that, "[w]here there are multiple transactions or multiple drug types, the quantities of drugs are to be added." Both fraud and drug offenses are among those specifically identified under the grouping rules in U.S.S.G. § 3D1.2(d).

his offense level. Id. at 438. The government then sought to prosecute him in the District of Vermont for the same fraud that the Connecticut court considered as relevant conduct (i.e., part of the $4 million) as well as other unrelated conduct.[9] Relying on Koonce, the Vermont district court dismissed certain counts of the indictment as a violation of double jeopardy (although it allowed prosecution of frauds not used to compute the Connecticut offense level. See United States v. McCormick, 798 F.Supp. 203 (D.Vt. 1992).

The Second Circuit affirmed, relying on Koonce. McCormick, 992 F.2d at 439. In addition, the Second Circuit concluded that section 5G1.3(b) was inapplicable to Mr. McCormick's situation. Id. 441 n. 3. The Court held that section 5G1.3(b) authorized multiple punishments at the first sentencing, thus precluding the second prosecution. Id. This contrasts markedly with the Fifth Circuit's analysis in Wittie which held that under relevant conduct principles, "the defendant is punished for both offenses both at sentencing for the first offense and at sentencing for the second offense." Wittie, 25 F.3d at 260.

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[9] The Vermont indictment was pending when the Connecticut case went to trial. McCormick, 992 F.2d at 438. The government suggested to the Connecticut court at sentencing that consideration of the Vermont conduct would preclude prosecution of that conduct in Vermont. Id. As a result, Mr. McCormick was sentenced at the top of the applicable guideline range, 46 months. Id.

Summary

The Fifth and the Seventh Circuits hold that "limited" multiple punishment under the Sentencing Guidelines for conduct that has already once been used to determine a sentence is consistent with the intent of Congress. The Second and Tenth Circuits assert that the double jeopardy clause forbids the second prosecution and punishment if the conduct already has been fully accounted for in the first sentencing and Congress's intent was to preclude the second prosecution for the relevant conduct. Because double punishment for the same offense violates the double jeopardy clause and because the conflict among the circuits creates exactly the kind of disparity in sentencing that the Sentencing Guidelines were enacted to curtail, this Court should grant Mr. Witte's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant his application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Date:
September 21, 1994

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas

By _____
THOMAS S. BERG
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 310
Post Office Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

UNITED STATES of America, Plaintiff-Appellant,

v.

Steven Kurt WITTIE, Defendant-Appellee.

No. 93-2245.

United States Court of Appeals, Fifth Circuit.

June 23, 1994.

Defendant moved to dismiss indictment charging him with conspiracy and attempt to import 1,091 kilograms of cocaine. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., dismissed indictment based on violation of multiple punishments prong of double jeopardy clause, and government appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) even if use of cocaine to enhance defendant's base offense level on marijuana charges was punishment, subsequent indictment on cocaine charges would not violate double jeopardy, and (2) defendant did not establish that he had reasonable belief that plea agreement would provide immunity from prosecution in other cases arising from same course of conduct.

Reversed and remanded.

1. Criminal Law ⇐1139

Court of Appeals reviews de novo dismissal of indictment on double jeopardy grounds. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐5.1, 6

Double jeopardy clause protects defendants from both multiple prosecutions and multiple punishments for same offense. U.S.C.A. Const.Amend. 5.

3. Double Jeopardy ⇐151(5)

Prosecution of defendant for conspiracy and attempt to import cocaine did not violate double jeopardy clause, though defendant had been convicted of marijuana offense that was part of same course of conduct as cocaine offense, and cocaine was included as relevant conduct to determine defendant's base offense level for that offense of conviction; Sentencing Guidelines required consideration of all relevant conduct in determining defendant's sentence, and harsh impact of second punishment was reduced by causing sentences for both marijuana and cocaine offenses to run concurrently and by giving credit for time served. U.S.C.A. Const. Amend. 5; U.S.S.G. § 5G1.3(b), 18 U.S.C.A.App.

26. *State v. White*, 498 So.2d 1100, 1102 (La.Ct. App.1986), *writ denied*, 506 So.2d 109 (La.1987).

27. *Id.*

28. 28 U.S.C. § 2254(d).

29. Marvin Craig White also claimed that he received ineffective assistance of counsel and that the prosecution withheld exculpatory evidence. As to the former claim, counsel's failure to hire an expert does not fall outside a range of reasonable effectiveness under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). And absent evidence to support the allegation that the produced photo lineup differed from the first photo book shown to Gayle White, Marvin Craig White fails to establish a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

4. Double Jeopardy ⇐28, 134

Although multiple prosecutions always violate double jeopardy, multiple punishments for same offense may or may not violate double jeopardy; if legislature intended to impose multiple punishments for same offense, there is no constitutional prohibition. U.S.C.A. Const.Amend. 5.

5. Double Jeopardy ⇐2

Purpose of double jeopardy clause in multiple punishments context is to ensure that punishment assessed does not exceed that authorized by legislature. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐1244

Purpose of grouping offenses to require that defendant's base offense level be determined by aggregating drug quantities from multiple counts in single proceeding is to ensure that accused receives same sentence that he would have received had he been charged and convicted of one narcotics count based on same totality of facts. U.S.S.G. § 3D1.2, 18 U.S.C.A.App.

7. Double Jeopardy ⇐30

Using prior crimes to enhance sentence does not impinge on double jeopardy, because such consideration does not involve punishment. U.S.C.A. Const.Amend. 5.

8. Double Jeopardy ⇐30

If defendant is convicted of murder and given life sentence and is later convicted for having kidnapped murder victim, sentencing court may consider fact that kidnapping victim was murdered when assessing death penalty rather than life sentence without violating double jeopardy. U.S.C.A. Const. Amend. 5.

9. Criminal Law ⇐1210(3)

When sentencing court has considered marijuana conviction in determining offense level for cocaine offense arising out of same course of conduct, it must impose concurrent sentences. U.S.C.A. Const.Amend. 5.

10. Double Jeopardy ⇐131

Defendant may be prosecuted and sentenced in more than one federal proceeding for different criminal offenses that were part of same course of conduct.

11. Criminal Law ⇐1244

Defendant's base offense level for each offense of conviction must be determined on basis of all relevant conduct. U.S.S.G. § 1B1.3(a), 18 U.S.C.A.App.

12. Criminal Law ⇐1244

Sentencing Guidelines clearly provide that government may convict defendant of one offense and punish him for all relevant conduct; then indict and convict him for different offense that was part of same course of conduct as first offense and sentence him again for all relevant conduct. U.S.S.G. § 5G1.3, 18 U.S.C.A.App.

13. Criminal Law ⇐1298

Effect of substantial assistance received from defendant in its initial prosecution of that defendant on marijuana charges did not pass to subsequent sentencing proceeding for different offense of conviction on cocaine charges, though charges were part of same course of conduct, where substantial assistance that defendant gave related only to marijuana, not cocaine, offense. U.S.S.G. § 5K1.1, 18 U.S.C.A.App.

14. Criminal Law ⇐1139

Whether government has violated terms of plea agreement is question of law, which on appeal is reviewed de novo.

15. Criminal Law ⇐273.1(2)

In determining whether government has breached plea agreement, court must determine whether government's conduct is consistent with defendant's reasonable understanding of agreement.

16. Criminal Law ⇐273.1(2)

Defendant must prove underlying facts that establish breach of plea agreement by preponderance of evidence.

17. Criminal Law ⇐273.1(2)

Government did not breach defendant's plea agreement on marijuana offense by charging him with cocaine offense from same course of conduct, though defendant expressed belief during sentencing hearing on marijuana conviction that he would be im-

mune from prosecution in other cases, where his counsel immediately contradicted defendant's statement and asked court not to include cocaine because it would deprive defendant of opportunity to plead not guilty and go to trial on that offense.

18. Criminal Law ⇐273.1(2)

Defendant's indictment for cocaine offense did not charge him with count that was dismissed under plea agreement for marijuana offense, though sentencing court determined that both charges arose out of same course of conduct, where there was no finding that offenses were part of same conspiracy count that was dismissed.

Peggy M. Ronca, Paula C. Offenhauser, Asst. U.S. Attys., Lawrence D. Finder, U.S. Atty., Houston, TX, for appellant.

Thomas S. Berg, Roland E. Dahlin, II, Federal Public Defender, David Gerger, Asst. Federal Public Defender, Houston, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM and WIENER, Circuit Judges; KAUFMAN,* District Judge.

WIENER, Circuit Judge:

Plaintiff-Appellant the United States (the government) appeals the district court's dismissal of its two-count indictment that charged Defendant-Appellee Steven Kurt Witte[1] with conspiracy and attempt to import 1,091 kilograms of cocaine into the United States. The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment through inclusion of the indicted offense in relevant conduct at sentencing for a related offense to determine Witte's base offense level. We disagree with the district court's conclusion that Witte would be subjected to impermissible multiple punishments for the same offense and therefore reverse and remand.

I

FACTS AND PROCEEDINGS

In August 1989, undercover DEA Agent Roger Norman negotiated with Dennis Mason in Tucson, Arizona to transport marijuana from Mexico into the United States. The negotiations were unsuccessful, but discussions between Norman and Mason resumed in Houston in June 1990. At that time, Witte, Mason, and Tom Pokorny planned to import marijuana from Mexico and cocaine from Guatemala. Both the Mexico deal and the Guatemala deal were going on simultaneously. Norman's job would be to fly the contraband into the United States.

In July 1990, the Mexican marijuana source advised that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The following month, Norman was told that the Mexicans were ready with 4,400 pounds of marijuana. Once Norman learned the coordinates of the airstrip, arrangements were made to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, 591 kilograms of cocaine were seized. The following day, while still undercover, Norman met Witte to explain that the pilots had been unable to land in Mexico because police had shown up at the airstrip.

Witte, Mason, and Pokorny were not charged with conspiracy and attempt to import cocaine at the time because Mason was incarcerated in Mexico and Pokorny's whereabouts were under investigation. All contact between Witte and Norman ceased until January 1991.

Norman next contacted Witte in January 1991 and asked Witte if he were interested in purchasing 1000 pounds of marijuana from Norman. Witte answered affirmatively, and said that he would call Norman to tell him whether he could raise the $50,000 downpayment. Witte telephoned three days later

* District Judge of the District of Maryland, sitting by designation.

1. Witte, not Wittie, is the correct spelling.

from Denver, Colorado stating that he had the downpayment. Witte asked Norman—who still had possession of Witte's horse trailer from the prior activities—to return the trailer so that it could be used as a load vehicle for the marijuana. Witte stated that he would bring from Denver a motor home owned by Sam Kelly to use as a second load vehicle.

On February 7, 1991, Witte met Norman in Houston and informed him that he could only come up with half of the downpayment. Norman agreed to give Witte 1000 pounds of marijuana for $25,000 in downpayment and to allow Witte three days to obtain the balance. Witte introduced Norman to Kelly and showed Kelly's motor home and its various hidden compartments to Norman. Fellow undercover officers took the motor home and trailer to load the marijuana, at which time Witte and Kelly took Norman to Witte's hotel room to view the money. The two vehicles arrived loaded with approximately 375 pounds of marijuana.[2] Witte and Kelly took possession and were promptly arrested.

The government indicted Witte for (1) conspiring to possess with intent to distribute more than 100 kilograms of marijuana [3] and (2) aiding and abetting possession with intent to distribute marijuana (collectively, the marijuana offense).[4] The charges resulted from the January–February 1991 "reverse-buy" of marijuana. Facing a statutory range of 5–40 years,[5] Witte entered a Rule 11(e)(1)(B) plea agreement with the government.

Witte pleaded guilty to the substantive count of aiding and abetting possession with intent to distribute marijuana and agreed to cooperate with the government by providing truthful and complete information concerning the charged offense as well as any others about which he might be questioned. The government agreed to dismiss count one of the indictment—conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991—and to file a § 5K1.1 motion if Witte's cooperation amounted to substantial assistance. Although not expressed in the recitation of terms of the agreement, the government states that Witte was also promised a recommendation to a three-year cap if he brought in Pokorny, who was involved in the cocaine offense. Although Witte did not assist the government in locating Pokorny, Witte's cooperation did cause his co-defendant in the marijuana offense, Sam Kelly, to plead guilty.

At sentencing, the district court found that the marijuana and cocaine offenses were part of the "same course of conduct." Over objections by both Witte and the government, the court included the cocaine in relevant conduct to determine Witte's base offense level.[6] The government urged the court to accept the parties' position that the cocaine deal was not relevant to the marijuana deal. The government argued against inclusion of the cocaine because it planned to indict Witte later for the cocaine offense. If the cocaine were not included in relevant conduct, the government could seek consecutive sentences for the cocaine and marijuana offenses. On the other hand, Witte objected to inclusion of the cocaine because he hoped for a shorter sentence: if only the 375 pounds of marijuana were considered, the Guideline range would be 63 to 78 months rather than 292 to 365 months.

Witte's base offense level was pegged at 40, with a Guideline range of 292 to 365 months. From that base offense level, Witte received a 2-level increase for his aggravating role in the offense and an offsetting 2-level decrease for acceptance of responsibility. The court granted the government's § 5K1.1 motion for downward departure based on Witte's substantial assistance. By

2. The vehicles were actually loaded with approximately 1,000 pounds of marijuana, but the government stipulated to the lesser quantity.

3. 21 U.S.C. § 841(a)(1), (b)(1)(B); 21 U.S.C. § 846.

4. 21 U.S.C. § 841(a)(1), (b)(1)(B); 18 U.S.C. § 2.

5. 21 U.S.C. § 841(b)(1)(B).

6. It is not clear whether the court determined the quantity of drugs involved in the cocaine offense to be 591 kilos (the amount seized) or 1,091 kilos (the amount seized plus an additional 500 kilos discussed). But inclusion of either quantity in relevant conduct results in a Guideline range of 40 (500–1500 kilos of cocaine).

virtue of that departure, Witte was sentenced to 144 months—148 months below the minimum sentence of 292 months under the pre-departure Guideline range. Witte appealed, but the appeal was dismissed due to Witte's failure to file a brief.

The government then indicted Witte and co-defendant Pokorny on two additional counts: (1) conspiring to import cocaine [7] and (2) aiding and abetting in the attempt to import cocaine [8] (collectively, the cocaine offense).[9] The indictment alleges that, between August 1989 and August 1990, Witte tried to import about 1,091 kilograms of cocaine from Central America. Witte moved to dismiss, arguing that he had already been punished for the cocaine offense because the cocaine was included in relevant conduct at sentencing for the marijuana offense. Witte also argued that the indictment breached the plea agreement.

The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment because the indicted offense had been included in relevant conduct at sentencing for the marijuana offense to determine Witte's base offense level. The court's conclusion on the breach of the plea agreement issue is not so clear, but it does not appear that the indictment was dismissed on that basis.[10] The government timely appealed the dismissal of the indictment.

7. 21 U.S.C. §§ 952(a), 960(b)(2)(B), 963.

8. 21 U.S.C. §§ 952(a), 960(b)(2)(B) and 18 U.S.C. § 2.

9. Although the "cocaine offense" involved the importation of cocaine and marijuana, it is referred to as the cocaine offense to distinguish it from the 1991 activities involving marijuana—the "marijuana offense."

10. The court stated that "[t]he effect of permitting such carving also defeats the spirit and intent of the plea bargaining process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away." The minute entry reads, "[T]he motion to dismiss on the basis of double jeopardy is granted."

II

ANALYSIS

A. *Double Jeopardy*

1. Standard of Review

[1] We review de novo the dismissal of the cocaine indictment on grounds of double jeopardy.[11]

2. Multiple Punishments Prohibited?

[2, 3] The Double Jeopardy Clause provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb." [12] The Supreme Court has left no doubt that the clause protects defendants from both multiple prosecutions and multiple punishments for the "same offense." [13] Witte argues that the government's present attempt to punish him for the cocaine offense violates double jeopardy's multiple punishments prong: he has already been "punished" for the cocaine offense charged in the subject indictment.

[4, 5] At the outset, we note the importance of distinguishing double jeopardy's prohibition of multiple prosecutions from its protection against impermissible multiple punishments. Although multiple prosecutions, i.e., more than one *prosecution* by the same sovereign for the same offense, always violate double jeopardy,[14] multiple *punishments* for the same offense *may* or *may not* violate double jeopardy. That is because Congress (or a state legislature) determines the scope

11. *United States v. Vasquez-Rodriguez*, 978 F.2d 867, 870 (5th Cir.1992); *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir.), *cert. denied*, 451 U.S. 974, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981).

12. U.S. Const. amend. V.

13. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076–77, 23 L.Ed.2d 656 (1969).

14. We emphasize that the indictment or the prosecution does not run afoul of the prohibition against multiple prosecutions. Witte is not subject to multiple prosecutions for the cocaine offense—he was never placed in jeopardy for that offense. Our concern is with the punishment that would result if Witte were to be prosecuted for the cocaine offense: he is potentially subject to multiple punishments for the cocaine offense.

of the constitutional protection in the multiple punishments context. If the legislature intended to impose multiple punishments for the same offense, imposition of such sentences does not violate the Constitution.[15] The purpose of the Double Jeopardy Clause in the multiple punishments context is to ensure that the punishment assessed does not exceed that authorized by the legislature (either the length of the sentence or the number of times that the sentence is imposed).[16]

For purposes of double jeopardy, the drugs involved in the "same offense"—conspiring and attempting to import cocaine—were included in relevant conduct to sentence Witte for the marijuana offense and are the subject of the dismissed indictment.[17] The pertinent issues are (1) whether inclusion of the cocaine in relevant conduct at sentencing for the marijuana offense punished Witte for the cocaine offense, and if so, (2) whether Congress has authorized single or multiple punishment for the cocaine offense. This double jeopardy issue is *res nova* in this circuit, but the Second and Tenth Circuits have considered it.[18] Both have concluded that a defendant's acts included as relevant conduct in calculating punishment for one offense may not later form the basis of another indictment without violating double jeopardy.[19]

In *United States v. Koonce*,[20] the defendant was convicted of distributing 443 grams of methamphetamine that he had mailed to his cohort. The district court sentenced him, however, for 7,869 grams. That quantity included 443 grams proved at trial, 963 grams found in his home, and 6,463 grams that Koonce was purported to have sold on other occasions. Inclusion of the additional grams in "relevant conduct" increased Koonce's offense level under the Guidelines from 32 (range: 188 to 235 months) to 34 (range: 235–293 months). Unlike Witte, Koonce received the maximum statutory sentence for all of the drugs (240 months).[21]

The government then brought a second indictment charging Koonce with the 963 grams of methamphetamine found in his home. The Tenth Circuit employed a three-

15. *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 678–79, 74 L.Ed.2d 535 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981)).

16. *Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 2525–26, 105 L.Ed.2d 322 (1989); *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985); *Missouri v. Hunter*, 459 U.S. 359, 366–68, 103 S.Ct. 673, 678–79, 74 L.Ed.2d 535 (1983); *Pearce*, 395 U.S. at 711, 89 S.Ct. at 2072; *United States v. Martinez*, 931 F.2d 851, 853 (11th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 268, 116 L.Ed.2d 221 (1991).

17. Thus both parties assume that the "same offense" element is satisfied under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). But clearly the statute under which Witte was convicted and the statutes under which he is now indicted proscribe different offenses, i.e., aiding and abetting possession of a controlled substance (21 U.S.C. § 841(a)(1); 18 U.S.C. § 2), and conspiring to import, and aiding and abetting in the attempt to import, a controlled substance (21 U.S.C. §§ 952(a), 963; 18 U.S.C. § 2). *Cf. Hunter*, 459 U.S. at 367, 103 S.Ct. at 678–79; *United States v. Cruce*, 21 F.3d 70, 75–76 (5th Cir.1994). We address the issues in this case, however, as they were presented by the parties.

18. Since this appeal was argued and taken under submission, another panel of this court has addressed the same issue that is now before us and has concluded, as we do, that double jeopardy does not preclude the subsequent prosecution and conviction of conduct that was earlier included in relevant conduct. *See Cruce*, 21 F.3d 70.

19. *United States v. Koonce*, 945 F.2d 1145 (10th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1695, 118 L.Ed.2d 406 and — U.S. —, 112 S.Ct. 1705, 118 L.Ed.2d 413 (1992); *United States v. McCormick*, 992 F.2d 437 (2d Cir.1993).

20. *Id.* *Koonce* was relied on by the district court in dismissing the indictment.

21. This fact does not distinguish *Koonce* from the case before us for purposes of double jeopardy analysis. If, like Koonce, Witte had received the statutory maximum sentence for all of the drugs (365 months), it might appear wasteful—though not a violation of double jeopardy—to prosecute him for the cocaine offense. But as Witte's counsel admitted at oral argument, the government does recognize some benefit from a second conviction: it receives a $50 cost assessment to balance the budget, and more importantly, the second conviction serves as a predicate for enhanced punishment under recidivist statutes. That second conviction reflects Witte's actual recidivist status.

step analysis to determine whether double jeopardy was thereby violated: First, had Koonce been punished for the methamphetamine found at his residence? Second, if so, did Congress intend that an accused in Koonce's position receive *cumulative*—although not necessarily *consecutive*—sentences from two separate proceedings if both sentences punish the accused for exactly the same conduct? Finally, if the first two inquiries are answered affirmatively, does the second punishment constitute "double" punishment even though the sentence derived therefrom is specified to run concurrently with the first sentence?

In answering the initial inquiry, the court concluded that Koonce had been punished for the drugs found at his residence because his base offense level would have been lower had they not been included via the relevant conduct provisions of the Guidelines. The "real offense" approach of the Guidelines required that Koonce be *punished* for the acts included in relevant conduct; therefore, concluded the *Koonce* court, he was punished.[22]

[6] Second, the *Koonce* court found that the government had failed to point out "any authority holding that Congress intended to punish a defendant a second time for conduct that [had] previously been aggregated into the base offense level for a related sentence in an earlier prosecution."[23] The court relied on (1) § 3D1.2's grouping requirement, which mandates that a defendant's base offense level be determined by aggregating drug quantities from multiple counts in a single proceeding, and (2) the Sentencing Commission's announced goal of preventing prosecutorial charge manipulation,[24] to determine that Congress intended only one punishment rather than multiple punishments. The purpose of grouping is to ensure that an accused receives the same sentence that he would have received had he been charged and convicted of one narcotics count based on the same totality of facts. Recognizing that Koonce had received the statutory maximum sentence possible for the total quantity of drugs, the Tenth Circuit concluded that Congress could not have intended a larger punishment if a defendant were prosecuted in two proceedings.

Third, the *Koonce* court concluded that even if the defendant's second sentence were specified to run totally concurrent with the first, a second sentence would violate double jeopardy. The court relied on *Ball v. United States*.[25] Ball, a previously convicted felon, was convicted in one proceeding for (1) the "receipt" of a firearm and (2) the "possession" of a firearm. He was sentenced to consecutive terms of imprisonment. On appeal, the Fourth Circuit remanded with instructions to modify the sentences to make them concurrent. The Supreme Court concluded that, as both offenses were established by the same criminal act, Congress had not intended to subject Ball to two *convictions*. Thus "one of the convictions, as well as its concurrent sentence, [was] unauthorized punishment for a separate offense."[26] In Koonce, the Tenth Circuit relied upon these statements to posit that a concurrent sentence can be "punishment."[27] As the Tenth Circuit had already decided that Congress had authorized only one punishment for that criminal act, the court concluded that this second punishment violated double jeopardy.

22. *Id.* (emphasis added).

23. *Id.*, 945 F.2d at 1151.

24. *Id.*, 945 F.2d at 1151–52; United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A.4(a), policy statement (1993).

25. 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

26. *Ball*, 470 U.S. at 864, 105 S.Ct. at 1673. "A separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences...." *Id.* at 865, 105 S.Ct. at 1673–74 (noting the potential for an increased sentence under a recidivist statute, possible delays in parole eligibility, and the societal stigma that results from the conviction itself).

27. *Koonce*, 945 F.2d at 1153. We do not disagree, but note that *any* sentence is punishment. The issue on which we part ways with the Tenth Circuit is whether a second punishment is authorized by Congress, the second element of the Tenth Circuit's analysis.

In *United States v. McCormick*,[28] the Second Circuit adopted *Koonce*'s analytical framework. It affirmed the dismissal of bank fraud charges for acts that were used in a prior case as relevant conduct to compute the defendant's base offense level. McCormick was charged with bank fraud in Connecticut that resulted in a $75,000 loss. Subsequent to that indictment, McCormick was charged for bank fraud in Vermont that allegedly resulted in a $4 million loss. He was then convicted on the Connecticut bank fraud charge. At sentencing for the Connecticut conviction, the loss was calculated to be in the $2.5–5 million range, a sum that obviously included the Vermont loss. McCormick's motion to dismiss the Vermont bank fraud charges on double jeopardy grounds was granted.

The Second Circuit determined that inclusion of the Vermont amount in relevant conduct amounted to punishment for the Vermont fraud in the Connecticut proceedings, and that a second punishment for the Vermont loss would violate double jeopardy. The Sentencing Guidelines' grouping provision requires that defendants in fraud cases, like drug offenders, be assessed "a single punishment for a set of similar acts."[29] "The Guidelines achieve consistency in sentencing for fraud cases by grouping all of the relevant conduct and applying a single offense level to the whole course of conduct."[30] The Second Circuit concluded that Congress apparently did not intend to allow a defendant to be *prosecuted* for conduct already used to increase his or her offense level. Being skeptical of the way that the Tenth and Second Circuits reached those results, we now examine the double jeopardy question independently.

28. 992 F.2d 437 (2d Cir.1993).

29. 992 F.2d at 440; *see* U.S.S.G. § 2F1.1, comment. (n. 6) ("The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.").

30. 992 F.2d at 440.

31. If a defendant is convicted of murder and given a life sentence, and is later convicted for having kidnapped the murder victim, the sentencing court may consider the fact that the kidnaping victim was murdered when assessing a death penalty rather than a life sentence without violating double jeopardy. *Williams v. Oklahoma*, 358 U.S. 576, 585–86, 79 S.Ct. 421, 426–27, 3 L.Ed.2d 516 (1959).

32. *Sekou v. Blackburn*, 796 F.2d 108, 111–12 (5th Cir.1986) ("[C]onsideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered." 796 F.2d at 112.).

a. Inclusion of Cocaine in Relevant Conduct: Punishment?

First, the government contends that inclusion of the cocaine in relevant conduct to *calculate* the defendant's base offense level is legally no different than *enhancing* his sentence by increasing a base offense level to a higher level under the Guidelines because of prior criminal activity. As increasing a base offense level by use of prior crimes is not "punishment" for prior crimes, argues the government, neither is using prior crimes to calculate a base offense level punishment for those prior crimes. Thus, concludes the government, Witte has not been "punished" for the cocaine offense. Witte counters that although enhancement of a sentence may not be punishment, counting the cocaine to determine his base offense level, with a corresponding 287-month increase in the maximum possible length of his sentence, is punishment.

[7, 8] It is well-settled that using prior crimes to "*enhance*" a sentence does not impinge on double jeopardy, because defendants are not "punished" for crimes so considered.[31] Pre-Guidelines, uncharged criminal conduct could be "considered" at sentencing as aggravating circumstances and could still form the basis of a later indictment, conviction, and sentence without violating double jeopardy.[32] The "real offense" approach to relevant conduct, however, may well lead to the conclusion that Witte was "punished" for the cocaine offense.

Stepping back from the somewhat artificial distinction between enhancement and calculation of a base offense level, we examine whether, pre-Guidelines, the prosecution and

punishment of Witte for the cocaine offense would have been foreclosed because Witte's cocaine activities were considered in imposing sentence for the marijuana offense. *Williams v. Oklahoma*[33] indicates that the answer is no. As the Supreme Court noted in *Williams*, the sentencing court "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[34]

> And in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor to have denied to him due process of law in violation of the Fourteenth Amendment.[35]

In Witte's case, the sentencing court is required by the Guideline's relevant conduct rules to consider the circumstances surrounding the particular offense of conviction. We find it clear that, like the crimes of kidnap and murder of the kidnap victim in *Williams*, the marijuana charge to which Witte pleaded guilty and was sentenced is an offense separate and distinct from the cocaine offense.[36] If, in *Williams*, consideration of the conduct constituting the separate offense of murder to increase the severity of the sentence for kidnaping was not punishment for the conduct so considered, then the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct. Of course, there is double use of single acts, but *Williams* apparently permits this. Williams was given a life sentence for murder and then the same murder was used to step up his punishment for kidnaping to death.

The only ostensible missing link in this analysis lies in the answer to the question whether, when Williams was sentenced to life imprisonment for murder, the sentencing court considered the kidnaping of the murder victim. Although not clear from the text of *Williams*, we may fairly assume that the uncharged kidnaping was considered when Williams was sentenced for murder. After all, the sentencing court "[was] authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[37] If so, then *Williams* is this case—*pre*-Guidelines.

[9] The fact that Witte's double jeopardy challenge arises *post*-Guidelines does not change the analysis of the punishment issue presented in *Williams*. Before adoption of the Guidelines, judges exercised their sound discretion in determining the appropriate level of punishment within established statutory ranges of imprisonment. Post-Guidelines, judges are still required to determine a sentence within an established statutory range. The Guidelines simply provide a formulae for what used to be left to trial court discretion. To improve consistency in sentencing, the Guidelines attempt to accommodate multiple uses of conduct. Specifically, the Guidelines require that when, in cases such as Witte's, the sentencing court has considered the marijuana conviction in determining the offense level for the cocaine offense, the court must impose concurrent sentences.[38]

Even if we assume arguendo that *Williams* does not absolutely dispose of this threshold punishment question, we would not end our analysis at this juncture. Rather, we accept for purposes of our analysis that Witte has been punished by inclusion of the cocaine activities in relevant conduct and proceed to consider whether a second punishment is nonetheless permitted by Congress.

b. Guidelines Authorize Multiple Punishment

We therefore turn to the Guidelines to determine the appropriate punishment—sin-

33. 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516.

34. 358 U.S. at 585, 79 S.Ct. at 426-27.

35. 358 U.S. at 586, 79 S.Ct. at 427.

36. *See supra* note 17.

37. *Williams*, 358 U.S. at 585, 79 S.Ct. at 427.

38. U.S.S.G. § 5G1.3(b). This subsection will be discussed in further detail in Part B, Section 2 of this opinion.

gle or multiple—to be assessed.[39] The Tenth Circuit's observation that grouping rules under the Guidelines prevents double counting and thus count manipulation is accurate. If Witte had been convicted in one proceeding of both the cocaine and marijuana offenses, grouping of counts—aggregation of the drug quantities—would result in a Guideline range of 292–365 months. The high end of the range serves as a cap to the *length* of the sentence (punishment) that Witte can receive for both offenses.[40] But the question here is whether Congress intended Witte to be subject to multiple punishments (a second punishment) for the cocaine—that had already been included in relevant conduct for a related sentence—as long as the aggregate length of his sentences did not exceed the lesser of the cap provided by the range or the statutory maximum sentence.

[10, 11] The Tenth Circuit found no authority in the Guidelines that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution.[41] But that court did not have the benefit of the present § 5G1.3(b) of the Guidelines, which Witte concedes in his motion to dismiss would require imposition of concurrent sentences if he were tried and convicted of the cocaine offense. Section 5G1.3 provides in pertinent part:

> *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment*
>
> (b) If ... the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.[42]

The commentary to § 5G1.3(b), application note 2, reflects that

> Subsection (b) ... addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions,[43] for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.[44]

The commentary clearly permits a defendant to be prosecuted—and sentenced—in more than one federal proceeding for different criminal offenses that were part of the *same course of conduct*.[45] More importantly, a

39. *United States v. McCormick*, 992 F.2d 437, 442 n. 1 (2d Cir.1993) (Mahoney, J., dissenting) (noting that the majority properly recognized that "in the sentencing area, Congressional intent is reflected in the Sentencing Guidelines").

40. The same is true if Witte is convicted in two separate proceedings for these offenses. His punishment cannot exceed 365 months in length. As we will demonstrate, this is accomplished by imposing concurrent sentences.

41. *Id.*, 945 F.2d at 1151.

42. U.S.S.G. § 5G1.3.

43. Two separate indictments were brought against Witte in the same federal jurisdiction, the Southern District of Texas (Houston division). Although subsection (b) discusses "two or more federal jurisdictions," Witte does not argue that § 5G1.3(b) does not apply on this basis. A common sense approach to that language is that subsection (b) also addresses prosecutions in "the same federal jurisdiction twice," i.e., the Southern District of Texas and the Southern District of Texas. Subsection (b) probably assumes that multiple counts resulting from the same course of conduct would be brought together if they occur in the same federal jurisdiction. Just as there are valid reasons for bringing two separate indictments against a defendant in two federal jurisdictions, there are valid reasons for bringing two separate indictments against a defendant in the same jurisdiction. In this case, the government did not believe that the offenses were part of the same course of conduct and had not completed its investigation of the cocaine offense.

44. U.S.S.G. § 5G1.3, comment. (n. 2).

45. *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994). In *Cruce*, this circuit indicated its disagreement with the Tenth and Second Circuits' views in *Koonce* and *McCormick*. Therefore, in this opinion, this panel is not free to adopt the approach of those cases. In *Cruce*, as in this case, it is to be noted that the defendants faced punishment for conduct that had not been charged, but that had been included in relevant

defendant's base offense level for each offense of conviction—unless the Guidelines expressly provide otherwise—*must* be determined on the basis of *all relevant conduct*.[46] The principle that all relevant conduct be considered in determining a defendant's base offense level is neither optional nor hortatory; it is mandatory.

[12] Read in pari materia, § 5G1.3(b) clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him *again* for all relevant conduct. To repeat, this proposition merely reflects Congress's specific intent that *all* relevant conduct be considered in determining a defendant's sentence. Consequently, we find no basis for distinguishing the situation described by § 5G1.3(b) from the one before us today.

Like it or not, we are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings—and that Congress accomplishes this intent—not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction on both counts in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding. Thus § 5G1.3(b) is "authority ... that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution," authority that the Tenth Circuit—without the benefit of § 5G1.3(b) in its present form—found lacking when it analyzed Koonce's double jeopardy challenge.[47]

The Second Circuit had the benefit of § 5G1.3(b) but distinguished the situation in *McCormick* from that described in § 5G1.3(b). That distinction concerns *when* the defendant will be punished for both offenses in a single sentencing proceeding, i.e., whether the defendant will be punished for both offenses at sentencing for the first offense (McCormick's situation) *or* at sentencing for the second offense (the Second Circuit's view of § 5G1.3(b)). But in our view, under § 5G1.3(b) and relevant conduct principles, the defendant is punished for both offenses *both* at sentencing for the first offense *and* at sentencing for the second offense.

With all due respect, we believe that the Second Circuit's analysis of § 5G1.3(b) suffers from two errors: first, it ignores—under § 5G1.3(b)—the application of relevant conduct principles to sentencing for the first offense; second, it does not consider McCormick's situation *at the relevant stage* addressed by § 5G1.3(b), i.e., at the sentencing stage for purposes of the instant offense.[48] The *McCormick* court did not consider that, *at sentencing* for the second offense, McCormick could be punished *again* for all relevant conduct. Section 5G1.3(b) assumes that a defendant has been prosecuted and convicted for the instant offense—an offense that was

conduct when they were sentenced in an earlier prosecution. *Cruce* expressly states that consideration of relevant conduct does not punish defendants *for relevant conduct* so considered but *for the offense of conviction*. *Id.* at 75 n. 8. Despite the temporal differences noted by the majority in *McCormick* between those circumstances and the circumstances set forth in § 5G1.3(b), the court in *Cruce* concluded that § 5G1.3(b) applied to the defendants because "it is clear that Congress and the Sentencing Commission anticipated the imposition of punishment—whether concurrent or consecutive—in a second proceeding and, thus, did not intend to preclude such proceeding." *Id.* at 77 n. 11. Accordingly, *Cruce* held that the second punishment did not violate double jeopardy.

46. U.S.S.G. § 1B1.3(a).

47. *Koonce*, 945 F.2d at 1151.

48. 992 F.2d at 441 n. 3. Again, it is the punishment or the sentence imposed for the cocaine offense, not the prosecution for that offense, that implicates double jeopardy concerns. If multiple punishments are impermissible, we foreclose a prosecution for the cocaine offense not because the prosecution would violate double jeopardy, but because it would be a waste of judicial resources to proceed to the sentencing stage only to have imposition of a sentence barred by double jeopardy.

part of the *same course of conduct* as an offense for which there is already a conviction and for which an appropriate *Guidelines* sentence has been assessed (hence the application of relevant conduct at the first sentencing proceeding)—and that it has proceeded to the sentencing stage.

Nevertheless, the Second Circuit recognized that in a case governed by subsection (b), the Sentencing Commission would require concurrent sentencing to avoid multiple punishments.[49] Thus, two sentences, though concurrent, have been authorized by the legislature in this situation, and thus would not violate double jeopardy. The significance of this analysis should be obvious: it is not the subsequent *prosecution* that is affected, but the subsequent *sentence* that may be pronounced and the manner in which such sentence may be imposed, assuming that the permitted subsequent prosecution produces a conviction.

3. Sentencing for the Cocaine Offense

[13] Witte argues that the drafters of § 5G1.3(b) could not have foreseen the circumstances of this case: a 5K1.1 motion in the first prosecution that will not pass to the second prosecution. Witte insists that it is unfair to allow the government—which received substantial assistance from a defendant in its initial prosecution of that defendant—to seek imposition of a *longer*, though concurrent, second sentence. In effect, Witte is asking this court to adopt a per se rule that the second sentence imposed cannot exceed the first if the first resulted from a § 5K1.1 motion, i.e., to "pass" the effect of a 5K1.1 motion from one sentencing proceeding for one offense of conviction to a subsequent sentencing proceeding for another offense of conviction. But Witte's otherwise appealing argument ignores an important aspect of the substantial assistance that he gave: It related only to the marijuana offense, not the cocaine offense. Significantly, Witte's argument also ignores application note 2 to § 5G1.3(b) and the background to this section, which makes clear that § 5G1.3(b) is intended to result in the appropriate incremental punishment that most nearly approximates the sentence that would have been imposed had both sentences been imposed at the same time.[50] This is accomplished both by (1) imposition of a concurrent sentence, and (2) giving credit for time served.

If Witte is ultimately convicted of the cocaine offense, the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses. Even so, there may be still be adjustments to the base offense level. For example, that level could be increased for an aggravating role or decreased for acceptance of responsibility.[51] For illustrative purposes, we assume that the offense level will again be 40, and that the Guideline range will be 292–365 months.[52] The sentencing court will then have to determine the appropriate *total* punishment for *both* offenses. For purposes of this illustration, we choose 292 months as the appropriate total punishment. Witte must then receive credit for time served. If, for example, Witte shall have served 30 months for the marijuana offense by the time of the second sentencing, the sentencing court must credit Witte with 30 months served, and impose a sentence of 262 months (292 minus 30) to run concurrently with the remainder of Witte's sentence for the marijuana offense. As the commentary to § 5G1.3(b) emphasizes, the 262-month sentence is not a departure from the Guidelines, but reflects a credit for Guidelines purposes for time that Witte has served. Under § 5G1.3(b), then, Congress allows "double punishment" for the cocaine offense but ameliorates its harsh impact and prevents punishment from exceeding the statutory maximum by causing sentences for both the marijuana and cocaine offenses to run concurrently and by giving credit for time served.

49. 992 F.2d at 441 n. 3.

50. U.S.S.G. § 5G1.3, comment. (n. 2, backg'd.).

51. *See* U.S.S.G. § 5G1.3(b), comment. (n. 2).

52. The sentencing court could even depart from the applicable Guideline range in response to a § 5K1.1 motion.

We turn now to the alternative basis urged by Witte for dismissal of the indictment.

B. *Breach of Plea Agreement*

Witte claims that the government breached the plea agreement by "re-indicting" the "same conspiracy." Again, as part of the plea agreement for the marijuana offense, the government dismissed the first count against Witte, conspiring to possess with intent to distribute more than 100 kilograms of marijuana from January 25, 1991 to February 8, 1991.

1. Standard of Review

[14] Whether the government has violated the terms of the plea agreement is a question of law, which on appeal is reviewed de novo.[53]

2. No Breach

[15, 16] In determining whether the government has breached a plea agreement, the court must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement."[54] The defendant must prove the underlying facts that establish a breach by a preponderance of the evidence.[55]

[17] During the sentencing hearing, Witte expressed a belief that he would be immune from prosecution in other cases. But Witte's counsel immediately contradicted Witte's statement. Additionally, his counsel asked the court not to include the cocaine because it would deprive Witte of the opportunity to plead not guilty and go to trial on that offense, not—as Witte contends—so that he could argue "breach of the plea agreement." Witte was expressly informed by the court that the government wanted to indict him later on the cocaine offense, and Witte expressed his understanding of this advice. Finally, Witte's substantial assistance did not relate to the cocaine offense, but only to the marijuana offense. Thus even if Witte somehow subjectively clung to the belief that he could not be prosecuted for the cocaine offense, that is not a reasonable understanding of the plea agreement. The government has not breached that agreement.

[18] Witte nevertheless contends that the government's present indictment charges him with the count that was dismissed pursuant to the plea agreement. We disagree. This indictment charges Witte with conspiring and attempting to import 1,091 kilograms of cocaine between August 1989 and August 1990. The government dismissed a count of conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991. Witte argues, though, that the same conspiracy underlies both counts, and that the government is bound under either of two doctrines—(1) the law of the case, or (2) collateral estoppel—by a "same conspiracy" finding by the sentencing court. Witte premises his argument on the novel idea that the sentencing court's "same course of conduct" finding constitutes a "same conspiracy" finding. This argument is unavailing.

A same conspiracy finding may be necessary to include the acts and omissions of *others* as relevant conduct, but it is not necessary to include Witte's own acts in relevant conduct.[56] The PSR Addendum refers to Witte's "agreement" (i.e., conspiracy), but the district court never specifically stated that he adopted the PSR or that specific finding. The only express finding by the sentencing court on this issue is that the relevant conduct spelled out in the PSR was "relevant conduct *related to the charge* to which he pleaded guilty." Neither did the sentencing court find that the cocaine and marijuana offenses were part of the "same conspiracy" count that was dismissed.

Even if on dismissing the indictment the district court had found that the marijuana and cocaine offenses were part of the same conspiracy, we would review such a finding

53. *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir.1993).

54. *Valencia*, 985 F.2d at 761 (citing *United States v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir. 1991)).

55. *United States v. Hernandez*, 996 F.2d 62, 64 (5th Cir.1993).

56. U.S.S.G. § 1B1.3(a)(1)(A), (a)(1)(B), (a)(2).

for clear error only. Under the facts of this case, it is obvious that two distinct conspiracies were involved: they were separated by time; they involved different co-conspirators; they involved different statutory offenses; they included different overt acts in each offense charged; and they occurred in different geographical locations.[57] Witte clearly has not been indicted for the same conspiracy count that was dismissed pursuant to the plea agreement.

III

CONCLUSION

For the foregoing reasons, we conclude that the district court improperly dismissed the indictment on double jeopardy grounds. Neither may the court's dismissal of the indictment be sustained on grounds that the government breached the plea agreement. The dismissal of the indictment is therefore REVERSED and the case REMANDED for proceedings consistent with this opinion.

25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

FEB 25 1993

Michael N. Milby, Clerk
By Deputy:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CIVIL ACTION NO. H-92-207
	§	
KURT STEVEN WITTE,	§	
	§	
Defendant.	§	

FEDERAL PUBLIC DEFENDER
RECEIVED
FEB 25 1993
SOUTHERN DIST. OF TEXAS
HOUSTON, TEXAS

ORDER DISMISSING INDICTMENT AS TO KURT STEVEN WITTE

Pending before the Court is the defendant's, Kurt Steven Witte, motion to dismiss because of double jeopardy and because of his claim that the government, in bringing these charges, breached its plea agreement with him. After reviewing the defendant's motion and the attachments and the government's response to the motion, the Court determines that the motion should be granted.

On March 4, 1991, a two-count indictment was filed in this District against the defendant in cause number H-91-33 charging him with conspiracy to process with intent to distribute marijuana and with aiding and abetting in the attempt to possess with intent to distribute marijuana, in violation of Title 21 U.S.C. §§841(a)(1), (b)(1)(B) and 846 and Title 18 U.S.C. §2.

Subsequently, the defendant entered a plea of guilty to Count 2, the aiding and abetting charge, pursuant to a plea agreement. That agreement provided that, in exchange for his plea of guilty and agreement to cooperate with the government in the marijuana case, the government would dismiss Count 1 of the indictment (*the conspiracy count*) and if it deemed the defendant's cooperation substantial a U.S.S.G. §5K1.1 motion for a downward departure in sentence would be filed.

As agreed, the co-defendant pled guilty and the government filed a §5K1.1 motion for a downward departure in sentencing. The defendant was sentenced on or about July 10, 1992. At that time a Presentence Report had been completed and filed and the sentencing judge sentenced the defendant to 144 months confinement in federal prison. In settling on this sentence, the sentencing court adopted the factual statements contained in the Report, particularly those in the "offense conduct" section.

The court arrived at an offense level of 40 by determining that the defendant had discussed and, therefore, intended to deliver 15 tons of marijuana from Mexico, 500 kilograms of cocaine from Guatemala, 591 kilograms of cocaine from Mexico, and was involved in a marijuana reverse buy, involving 1,000 pounds of marijuana in Houston, Texas. The probation

officer, pursuant to U.S.S.G. §2D1.4, converted the 1091 kilograms of cocaine into the equivalent kilograms of marijuana. (232,261.6 kilograms).

Having established the marijuana equivalency, the probation officer concluded that the offense level of 40 was appropriate because the amount of marijuana involved was at least 100,000 kilograms but less than 300,000 kilograms. The probation officer determined that the defendant played an aggravating role and, pursuant to U.S.S.G. §3B1.1(c), increased the defendant's offense level by two (2) resulting in an adjusted offense level of 42. This offense level permitted the court to sentence the defendant between 360 months and life confinement.

When the defendant appeared for sentencing, the court, in accordance with the government's motion for a departure pursuant to U.S.S.G. §5K1.1 sentencing, sentenced the defendant to 144 months confinement, essentially sentencing the defendant at offense levels 32 or 33. *(Levels 32 and 33 together permit sentencing between 121 and 168 months).*

On September 2, 1992, the government caused a second indictment to be returned against the defendant wherein the defendant is charged with conspiracy to import cocaine into the United States (Count 1) and aiding and abetting the attempt to import cocaine into the United States (Count 2). It

is this indictment that is the subject of this motion.

Contentions:

The government contends that the charges of conspiracy to import cocaine and aiding and abetting charged in this case are separate and distinct offenses from the conspiracy and aiding and abetting the possession with intent to distribute marijuana charges filed in cause number H-91-33. The government points out that the evidence concerning the cocaine offenses occurred between August 18, 1989, and August 15, 1990, some seven (7) months prior to the marijuana offenses. Therefore, double jeopardy does not apply.

The government also contends that, because the sentence on the marijuana conviction must be served concurrently with any sentence on a cocaine conviction, the defendant suffers no harm.

The defendant contends that jeopardy attached when the defendant was sentenced based upon consideration of offense conduct that occurred in 1989 and 1990. The defendant contends that, because his punishment, including the §5K1.1 downward departure, exceeded the maximum punishment that the defendant could have been sentenced to had he been sentenced only on the marijuana offense, the plea agreement is breached by this current

indictment.

Discussion:

The two components of the double jeopardy principle provide protection against a subsequent prosecution for the same offense and against multiple punishments. See *Grady v. Corbin*, 495 U.S. 588 (1990); see also *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991).

In the case at bar, the Court focuses only on the second prong of the double jeopardy protection. In this vein, *Ball v. United States*, 470 U.S. 856 (1985), is instructive. In *Ball*, the Court held that the Congress, in enacting the Sentencing Guidelines, did not intend to punish the same offense under two separate statutes: (the sentencing guidelines vs. the criminal statutes). The guidelines support this observation. Under §3D1.1(a), the "Procedure for Determining Offense Level on Multiple Counts", the guidelines provide that:

> "[W]hen a defendant has been convicted of more than one count, the court shall:
>
> (1) Group the Counts resulting in conviction into distinct Groups of Closely-Related Counts ('Groups') by applying the rules specified in §3D1.2.

Section 3D1.2 speaks to the circumstance where the same victim is involved in two or more acts or transactions by a common criminal objective or constituting part of a common scheme or plan. The fact that offenses occur

at different times or that offenses may involve different types of drug activity is of no moment. (See Commentary U.S.S.G §3D1.2). Moreover, even if the criminal objective or scheme constitutes or is composed of legally distinct offenses occurring at different times, the teachings of *Ball* still apply.

The circuit court in *Koonce* expressed the same view. 945 F.2d 1145. Koonce was charged with one count of distributing an unspecified amount of methamphetamine. When the trial court calculated the sentence, it considered other methamphetamine seized at the defendant's residence as well as a quantity sold to a co-defendant. The Court sentenced Koonce after considering all of the methamphetamine identified.

Later, the government decided to prosecute Koonce on the methamphetamine seized at the defendant's home. There as here, the government argued separate and distinct crimes, and no harm in the concurrent sentencing scheme. In rejecting the arguments, the circuit court concluded that the trial court had aggregated Koonce's related crimes and conduct, prior and subsequent, in computing the base offense level and had sentenced him accordingly. Thus, the circuit court concluded that a subsequent punishment would violate the double jeopardy clause of the federal Constitution.

That reasoning and conclusion apply in the case at bar. The government cannot be permitted to craft or develop a scheme by which a person may be twice punished. See *Koonce*, 945 F.2d 1145. This limitation is for a good reason. The government, with its awesome power, gets to choose the crime(s) for which a citizen may be prosecuted. For example, in this case, the marijuana charge resulted from a marijuana reverse buy. Readily, one can see that the government could orchestrate any number of individual drug transactions over a period of months or years and charge each transaction as a separate violation. Certainly, the government should be permitted to decide from which well it draws the poison, but it cannot then declare successive draws as constituting different poisons.

The findings of the sentencing judge in the marijuana conviction show that drug dealings between the defendant and the undercover agents was "reactivated" in June 1990. At that time, the undercover agents wanted both marijuana and cocaine imported into the United States. When a shipment of cocaine was seized in August of 1990, all contact between the undercover agents and the defendant ceased. The activity resumed in January 1991, when an undercover agent contacted the defendant. This contact resulted in the defendant's conviction on the marijuana charge. The sentencing court found

that the June and July 1990, meetings were signi ant and permitted the establishment of the "infrastructure" of the subsequent marijuana conviction. Armed with this evidence, it is no wonder that the sentencing court saw the activity in January of 1991 and June 1990 as a series of transactions constituting one common scheme or plan.

It is this Court's opinion that the prosecution of the defendant on the cocaine conspiracy and substantive count constitutes a violation of the Double Jeopardy Clause of the United States Constitution because it seeks to punish a second time conduct already punished.

The effect of permitting such carving also defeats the spirit and intent of the plea bargaining process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away.

It is ORDERED that the defendant's, Kurt Steven Witte, motion to dismiss is hereby GRANTED.

Signed this 24th day of February, 1993.

KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

ORIGINAL

No. 94-6187

Supreme Court, U.S.
FILED
NOV 22 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RECEIVED
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NOV 22 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STEVEN KURT WITTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a court from convicting and sentencing a defendant for an offense solely because the conduct underlying the offense was previously considered in determining the defendant's sentence for a separate crime.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-6187

STEVEN KURT WITTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-28) is reported at 25 F.3d 250. The opinion of the district court (Pet. App. 29-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 2, 1992, a grand jury in the United States District Court for the Southern District of Texas returned an

indictment charging petitioner with conspiracy to import cocaine, in violation of 21 U.S.C. 963, and attempting to import cocaine, in violation of 21 U.S.C. 952(a). The district court dismissed the indictment on double jeopardy grounds. Pet. App. 29-36. The court of appeals reversed. Id. at 15-28.

1. In August 1989, undercover DEA Agent Roger Norman negotiated with Dennis Mason in Tucson, Arizona, to transport marijuana from Mexico into the United States. The negotiations were unsuccessful, but in June 1990, discussions between Norman and Mason resumed in Houston, Texas. Petitioner and Tom Pokorny joined in those discussions. Petitioner, Pokorny, and Mason eventually planned to import marijuana from Mexico and to import cocaine from Guatemala, with the two deals going on simultaneously. Norman's job was to fly the drugs into the United States. Pet. App. 17; Gov't C.A. Br. 3-4.

In July 1990, the Mexican source for the marijuana indicated that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The next month, Norman was told that the Mexican suppliers were ready to ship 4,400 pounds of marijuana. After learning the location of the airstrip, Norman arranged to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, 591 kilograms of cocaine were seized. The following day, Norman told petitioner that the pilots had been unable to land in Mexico because the police had arrived at the airstrip. Pet. App. 17; Gov't C.A. Br. 4.

Norman's next contact with petitioner occurred in January 1991, when Norman asked whether petitioner was interested in purchasing 1,000 pounds of marijuana. Petitioner agreed to purchase the marijuana, but he said that he would call Norman the following Monday to tell him whether he could raise the $50,000 downpayment. Three days later, petitioner called Norman from Denver, Colorado, and said that he had the downpayment. Petitioner asked Norman to return a horse trailer that he had used in their earlier activities so that it could be used as a load vehicle for the marijuana. Petitioner stated that he would bring a motor home owned by Sam Kelly to use as a second load vehicle. Pet. App. 17-18; Gov't C.A. Br. 4-5.

On February 7, 1991, petitioner met Norman in Houston. He told Norman that he had come up with only half of the downpayment for the 1,000 pounds of marijuana. Norman agreed to accept the $25,000 downpayment and to allow petitioner three days to obtain the balance. After introducing Norman to Kelly, petitioner showed Norman the motor home and its hidden compartments. While fellow undercover agents took the motor home and trailer to load the marijuana, petitioner, Kelly, and Norman went to petitioner's hotel room to view the money. Shortly afterwards, the vehicles arrived loaded with 1,000 pounds of marijuana. Petitioner and Kelly were arrested when they took possession of the vehicles. Pet. App. 18; Gov't C.A. Br. 5.

2. On March 4, 1991, a grand jury in the United States District Court for the Southern District of Texas returned an

indictment charging petitioner and Kelly with conspiring to possess marijuana with intent to distribute it between January 25 and February 8, 1991, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute it on February 8, 1991, in violation of 21 U.S.C. 841(a). On February 21, 1992, pursuant to a plea agreement, petitioner pleaded guilty to the substantive marijuana possession count. Petitioner agreed to cooperate by providing complete and truthful information, and the government agreed to file a motion under Sentencing Guidelines § 5K1.1 if petitioner's cooperation amounted to substantial assistance. The government promised to recommend a three-year cap to the sentence if petitioner helped locate Pokorny. Petitioner did not assist the government in locating Pokorny, but his cooperation led to Kelly's guilty plea. Pet. App. 18; Gov't C.A. Br. 5-6. In addition to dismissing the conspiracy count, the government stipulated that the quantity of marijuana involved in the offense was 375 rather than 1,000 pounds. Pet. App. 18 n.2.

At the sentencing hearing on July 10, 1992, the district court concluded that petitioner's attempt to import marijuana and cocaine in 1990 was part of the same course of conduct as the marijuana offense in 1991 that was charged in the indictment. Accordingly, the court concluded that the marijuana and cocaine involved in the 1990 importation scheme constituted "relevant conduct" under Sentencing Guidelines § 1B1.3 for the purpose of determining petitioner's sentence. After aggregating the quantities of drugs involved in petitioner's 1990 and 1991 activities, petitioner's

base offense level under Sentencing Guidelines § 2D1.1(c)(2) (Drug Quantity Table) was 40.[1] Pet. App. 18 & n.6, 30-31; PSR 3-5, 7-8, 9.

Both the government and petitioner objected to the sentencing court's quantity determination on the ground that plea agreement had stipulated that the quantity of marijuana involved in the offense was 375 pounds. The government also urged the court to accept the parties' position that the attempt to import marijuana and cocaine in 1990 was not part of the same course of conduct as the 1991 marijuana offense to which petitioner pleaded guilty, and that it should therefore not be considered in sentencing. In addition, the government informed the court that it planned to file a separate indictment of petitioner for the 1990 cocaine offenses.[2] Pet. App. 18.

After making offsetting adjustments for an aggravating role in the offense and acceptance of responsibility, the sentencing court

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[1] Based on the presentence report (PSR), the sentencing court found that the total quantity of drugs was equivalent to 232,261.6 kilograms of marijuana. That figure was the sum of (1) the 1,000 pounds (453.6 kilograms) of marijuana involved in the offense to which petitioner pleaded guilty, and (2) the 15 tons (13,608 kilograms) of marijuana that petitioner, Mason, and Pokorny planned to import from Mexico in 1990; the 500 kilograms of cocaine (equivalent to 100,000 kilograms of marijuana) that petitioner, Mason, and Pokorny planned to import from Guatemala in 1991; and the 591 kilograms of cocaine (equivalent to 118,200 kilograms of marijuana) seized when several conspirators were arrested in Mexico on August 12, 1990. Pet. App. 18 & n.6, 30-31; PSR 3-5, 7-8, 9.

[2] The government determined to bring separate indictments for the 1990 and the 1991 events because it did not view the transactions as part of the same course of conduct and because it had not completed investigation of the 1990 cocaine importation scheme at the time of the indictment for the 1991 marijuana offenses. Pet. App. 24 n.43.

concluded that petitioner's Guidelines sentencing range was 292-365 months' imprisonment. The court granted the government's motion for a downward departure under Guidelines § 5K1.1 based on petitioner's substantial assistance, and it departed downward by 148 months to arrive at a sentence of 144 months' imprisonment. Petitioner appealed, but his appeal was dismissed for failure to file a brief. Pet. App. 18-19; Gov't C.A. Br. 6-7.

3. On September 2, 1992, the grand jury returned the indictment in this case charging petitioner and Pokorny with conspiring to import cocaine between August 18, 1989, and August 15, 1990, in violation of 21 U.S.C. 963, and attempting to import cocaine between August 18, 1989, and August 15, 1990, in violation of 21 U.S.C. 952(a). Petitioner moved to dismiss the indictment on the ground that he had already been punished for the cocaine offenses because the quantities of cocaine were included as relevant conduct in the determination of his sentence for the 1991 marijuana offense to which he pleaded guilty. Pet. App. 19; Gov't C.A. Br. 7.

The district court dismissed the indictment on double jeopardy grounds. Pet. App. 29-36. Relying on United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), the court ruled that "the government cannot be permitted to craft or develop a scheme by which a person may be twice punished." Pet. App. 35. It also noted its approval of the sentencing court's determination that the marijuana offense and cocaine importation activities involved "one common scheme or plan." Id. at 36. The court therefore concluded that the

indictment was barred by the Double Jeopardy Clause "because it seeks to punish a second time conduct already punished." Ibid.

4. The court of appeals reversed, rejecting petitioner's claim that this prosecution would violate the Double Jeopardy Clause's prohibition against multiple punishments for the same offense. Pet. App. 15-28. Relying on Williams v. Oklahoma, 358 U.S. 576 (1959), the court held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct." Pet. App. 23. Accordingly, even though petitioner's 1990 cocaine activities were considered as relevant conduct in determining his sentence for the 1991 marijuana offense, the court concluded that petitioner had not been punished for his cocaine activities in that prosecution, and the Double Jeopardy Clause therefore did not bar the later prosecution and punishment of petitioner for the cocaine offenses. Id. at 22-23. The court disagreed with holdings in United States v. Koonce, supra, and United States v. McCormick, 992 F.2d 437 (2d Cir. 1993), that when a defendant's actions are included as relevant conduct in determining the punishment under the Sentencing Guidelines for one offense, those actions may not later form the basis of a second indictment without violating the Double Jeopardy Clause. Pet. App. 19-26.

Even if the inclusion of the cocaine activities as relevant conduct in the determination of petitioner's sentence for the marijuana offense constituted punishment, the court of appeals concluded that Congress intended petitioner to be subject to

multiple punishments for the cocaine offenses. Pet. App. 23-26. The court observed that Guidelines § 5G1.3 contemplates that related offenses will sometimes result in multiple prosecutions and that the provision indicates an intent that the cumulative punishment in separate prosecutions should not exceed "that which would have resulted from prosecution and conviction on both counts in a single proceeding." Id. at 25. The court concluded that because two concurrent sentences are authorized by Congress in a case such as this one, the punishment imposed in the second prosecution does not violate the Double Jeopardy Clause. Id. at 26.[3]

DISCUSSION

Petitioner contends (Pet. 8-13) that the Double Jeopardy Clause bars prosecution and punishment of a defendant for criminal conduct that has previously been taken into account as relevant conduct under the Sentencing Guidelines in determining his sentence for another offense. He relies (Pet. 8) on the protection afforded by the Double Jeopardy Clause against multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Pet. App. 19. In our view, the court of appeals properly rejected petitioner's contention. Because the courts of appeals

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[3] The court of appeals rejected petitioner's claim that a concurrent sentence for the second offense could not exceed the sentence for the first offense when the first sentence resulted from a downward departure from the Guidelines sentencing range based on a substantial assistance motion under Guidelines § 5K1.1. Pet. App. 26. The court also rejected petitioner's claim that the indictment should be dismissed on the theory that the government had breached its plea agreement. Id. at 27-28. Petitioner does not renew either of those claims in this Court.

are divided on the question, however, and because its resolution significantly affects courts' sentencing authority when the government brings multiple prosecutions against a defendant for related crimes, we agree that the question presented warrants this Court's review.

1. Petitioner argues that the consideration of his 1990 scheme to import cocaine in sentencing him for his 1991 marijuana offense constituted punishment for his cocaine importation scheme, and that he therefore could not be punished for the cocaine importation scheme in this prosecution. It is well established, however, that a sentencing court may conduct a broad inquiry into a defendant's background and criminal history in establishing an appropriate sentence for the offense of conviction. Nichols v. United v. United States, 114 S. Ct. 1921, 1927-1928 (1994); Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993). When a court takes such other conduct into account in sentencing, the defendant is not "punished" for that other conduct; rather, the only offense for which the defendant receives punishment within the meaning of the Double Jeopardy Clause is the offense of which the defendant was convicted. See Williams v. Oklahoma, 358 U.S. 576, 585-586 (1959).

In Williams, a defendant, after being sentenced to life imprisonment for murder, was separately charged with the kidnaping that led to his victim's death. In imposing a death sentence for that kidnaping, the sentencing court expressly relied on the previously prosecuted murder. 358 U.S. at 581. This Court held

that no double jeopardy violation had occurred, explaining that "in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing [defendant] a second time for the same offense." Id. at 586. Williams makes clear that a court does not punish an offender for uncharged conduct when it takes that conduct into account at sentencing. There is, therefore, no double jeopardy bar to a subsequent prosecution based on conduct that was previously considered in sentencing for a separate offense.

If a defendant were "punished" for uncharged conduct within the meaning of the Double Jeopardy Clause whenever a court considered that conduct in setting a sentence for the offense of conviction, recidivist statutes would inflict impermissible multiple punishment. This Court, however, has repeatedly held that recidivist statutes do not infringe the Double Jeopardy Clause or constitute a second punishment for the prior offense. See Spencer v. Texas, 384 U.S. 554, 560 (1967); Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901); Moore v. Missouri, 159 U.S. 673, 678 (1895); cf. Schiro v. Farley, 114 S. Ct. 783, 789-790 (1994) (acquitted conduct may be considered as an aggravating factor in a capital sentencing proceeding for a separate offense without violating the Double Jeopardy Clause's prohibition against multiple prosecutions). The same principle applies under the

Sentencing Guidelines. A court does not "punish" a defendant in the sense required to invoke the Double Jeopardy Clause by considering uncharged activities of a defendant as "relevant conduct" in establishing a sentence for the offense of conviction. The Constitution therefore does not forbid subsequent punishment of the defendant for that relevant conduct when it is charged in a subsequent prosecution.[4]

2. As petitioner notes, the courts of appeals are divided on the question presented in this case. Like the Fifth Circuit in this case, the Seventh Circuit has concluded that the Double Jeopardy Clause does not bar prosecution and punishment of a defendant for criminal conduct that has previously been taken into account under the Sentencing Guidelines in determining his sentence for a prior related offense. See United States v. Brown, 31 F.3d 484, 494-496 (7th Cir. 1994); United States v. Duatre, 28 F.3d 47, 48 (7th Cir. 1994). On the other hand, the courts in United States v. McCormick, 992 F.2d 437 (2d Cir. 1993), and United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), have reached a contrary conclu-

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[4] There are often valid reasons why related crimes committed by a defendant are not prosecuted in the same proceeding. In some cases, venue for all of the crimes does not lie in the same district. Even when all of the charges may be brought in the same district, investigation of some of them may not be complete at the time the defendant was apprehended -- as was the case here. Pet. App. 24 n.43. Because this Court has consistently rejected the view that the Double Jeopardy Clause requires that all crimes that are part of the same transaction must be prosecuted in the same proceeding, see, e.g., United States v. Dixon, 113 S. Ct. 2849, 2863 n.14 (1993), the prosecution of related offenses in separate proceedings does not in itself raise any issue under the Double Jeopardy Clause.

sion. In McCormick and Koonce, uncharged criminal conduct was considered in determining the defendant's offense level under the Sentencing Guidelines for the offense of conviction. The government then sought to prosecute the defendant for that criminal conduct. The Second and Tenth Circuits, however, held that the prosecutions were barred by the Double Jeopardy Clause. That holding, as the court of appeals here recognized, conflicts with the result in this case. Pet. App. 254-262; see also United States v. Duatre, 28 F.3d at 48 (rejecting analysis in McCormick and Koonce).

Both the Second and Tenth Circuits reasoned that a defendant in petitioner's position would experience multiple punishment and that the intent of Congress, as expressed in the Sentencing Guidelines, was not "to allow a defendant to be prosecuted for conduct already used to enhance his or her offense level." McCormick, 992 F.2d at 440-441; Koonce, 945 F.2d at 1150-1152. The court of appeals in this case correctly rejected that analysis. Pet. App. 259-261. As its accompanying commentary indicates, Sentencing Guidelines § 5G1.3(b) "clearly permits a defendant to be prosecuted -- and sentenced -- in more than one federal proceeding for different criminal offenses that were part of the same course of conduct." Pet. App. 25 (emphasis omitted); see Sentencing Guidelines § 5G1.3, Application Note 2 (Guidelines § 5G1.3(b) addresses cases in which "a defendant is prosecuted * * * in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course

of conduct"). Section 5G1.3(b) address such cases by indicating that the combined period of imprisonment resulting from multiple prosecutions for related crimes should not ordinarily exceed the term that would have resulted from a single prosecution. That approach, which relies on the power of the court to provide for concurrent sentences, is quite different from the view that a second prosecution should be foreclosed altogether.

The government sought review of the decision in Koonce, but the Court denied certiorari. 112 S. Ct. 1705 (1992). At the time of the decision in Koonce, no other court of appeals had considered the double jeopardy consequences of prosecution and punishment for conduct that was previously considered in determining a defendant's offense level under the Sentencing Guidelines. 945 F.2d at 1152-1153. It remains our view that the Sentencing Guidelines context is not different for double jeopardy purposes from the pre-Guidelines context. If the Double Jeopardy Clause is not violated by punishment for conduct that was considered at sentencing in an earlier case, it cannot be significant whether the consideration was totally unguided, as it was in pre-Guidelines cases,[5] or was used to make adjustments of base offense levels under the

---

[5] See, e.g., Sekou v. Blackburn, 796 F.2d 108, 111 (5th Cir. 1986) ("Consideration of criminal conduct as an aggravating circumstance does not convert the sentencing proceeding into a trial, conviction, or punishment for the criminal activity so considered.").

Guidelines,[6] or was used to determine where to fix the defendant's sentence within a particular Guidelines range.[7]

In any event, like Koonce and McCormick, this case involves a subsequent prosecution for criminal conduct that was considered in determining a defendant's offense level under the Guidelines for a prior related offense. In light of the clear conflict that has developed among the courts of appeals on the application of the Double Jeopardy Clause to that sequence of events, this Court's review is warranted.

---

[6] See, e.g., United States v. Carey, 943 F.2d 44, 46 n.4 (11th Cir. 1991) ("Enhancement of a sentence based on criminal conduct other than that underlying the instant conviction * * * is not considered 'punishment' for that conduct in the double jeopardy context because the court is sentencing the defendant only for the instant offense."), cert. denied, 112 S. Ct. 1676 (1992); United States v. Williams, 935 F.2d 1531, 1538 (8th Cir. 1991) ("Although the court in the [earlier] case inquired into the [later] offense during the sentencing hearing, at no time was Williams put 'in jeopardy' for the [later] offense until the actual trial for the [later] offense."), cert. denied, 112 S. Ct. 1189 (1992).

[7] See, e.g., United States v. Mack, 938 F.2d 678, 679 (6th Cir. 1991) (the prohibition against double jeopardy "is not implicated when a defendant is indicted for an incident of conduct previously used to increase the length of his sentence for a separate offense").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

NOVEMBER 1994

Supreme Court, U.S.
FILED
FEB 8 1995
OFFICE OF THE CLERK

No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

vs.

UNITED STATES

On Writ Of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

JOINT APPENDIX

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

Counsel for Petitioner

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, DC 20530
Telephone: (202) 514-2217

Counsel for Respondent

Petition For Certiorari Filed September 21, 1994
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169 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries,

Cr. No. H-92-207 1

Cr. No. H-91-033 2

Criminal Complaint, Cr. No. H-91-033..... 3

Indictment, Cr. No. H-91-033..... 9

Plea Agreement, Cr. No. H-91-033..... 11

Transcript of Rearraignment, Cr. No. H-91-033 16

Transcript of Sentencing Hearing, Cr. No. H-91-033 45

Judgment in a Criminal Case, Cr. No. H-91-033 74

Indictment, Cr. No. H-92-207..... 82

Transcript of Hearing on Defendant's Motion to Dismiss, Cr. No. H-92-207 84

Order Dismissing Indictment, Cr. No. H-92-207..... 130

Opinion of the United States Court of Appeals for the Fifth Circuit, No. 93-2245, *United States v. Wittie*, 25 F.3d 250 (5th Cir. 1994)..... 137

Order of the United States Supreme Court Granting Certiorari and leave to proceed in forma pauperis, January 6, 1995..... 167

STEVEN KURT WITTE V. UNITED STATES
NO. 94-6187
Relevant Docket Entries*
Cr. No. H-92-207 (S.D. Tex.)

Date	Proceedings
09/02/92	Indictment filed
12/23/92	Defendant's motion to dismiss because of double jeopardy and breach of the plea agreement filed
02/12/93	Government's response to Defendant's motion to dismiss because of double jeopardy and breach of the plea agreement filed
02/22/93	Defendant's reply to Government's response to Defendant's motion to dismiss because of double jeopardy and breach of the plea agreement filed
02/22/93	Order following pretrial conference granting motion to dismiss because of double jeopardy and breach of the plea agreement entered
02/24/93	Order granting motion dismissing indictment entered
03/22/93	Government's notice of appeal filed
	C.A. No. 93-2245 (5th Cir.)
04/13/93	Order of the Court of Appeals for the Fifth Circuit granting Government's motion to supplement the record with the record in Cr. No. H-91-033 filed
06/23/94	Opinion of the Court of Appeals for the Fifth Circuit reversing the judgment of the District Court issued

* Text of entries edited for clarity.

STEVEN KURT WITTE V. UNITED STATES
NO. 94-6187
Relevant Docket Entries*
Cr. No. H-91-033 (S.D. Tex.)

Date	Proceedings
02/11/91	Criminal complaint filed
03/04/91	Indictment filed
02/21/92	Rearraignment held and guilty plea on Count Two entered
06/18/92	Final presentence investigation report filed
06/22/92	Defendant's objections to the presentence report filed
07/10/92	Defendant sentenced (Count 2) 144 mos. to serve plus 5 yrs. supervised release term and $50 special assessment imposed – Government's motion to depart granted, and Defendant's motion to withdraw plea denied
07/10/92	Motion by Government for downward departure for substantial assistance filed
07/10/92	Order dismissing Count One entered
07/10/92	Order granting motion for downward departure entered
07/10/92	Defendant's notice of appeal filed
07/14/92	Judgment entered
	C.A. No. 92-2567 (5th Cir.)
12/16/92	Order of the Court of Appeals for the Fifth Circuit, dismissing appeal for failure to file brief, entered

* Text of entries edited for clarity.

United States District Court
DISTRICT OF

UNITED STATES OF AMERICA
V.

CRIMINAL COMPLAINT

Kurt Steven WITTIE
Sam Richard KELLY

CASE NUMBER: H-91-121M

(Name and Address of Defendant)

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. On or about February 8, 1991 in Harris county, in the Southern District of Texas defendant(s) did, (Track Statutory Language of Offense)

knowingly, willfully, unlawful and intentionally conspire to possess with intent to distribute more than 100 kilograms of marijuana.

in violation of Title 21 United States Code, Section(s) 846 and 841(a)(1) I further state that I am a(n) DEA Special Agent and that this complaint is based on
Official Title
the following facts:

See Attached Affidavit

Continued on the attached sheet and made a part hereof:
[X] Yes [ ] No

/s/ Illegible
Signature of Complainant

Sworn to before me and subscribed in my presence,

2/11/91
Date

at Houston, Texas
City and State

_____	/s/ George A. Kelt Jr.
Name & Title of Judicial Officer	Signature of Judicial Officer

AFFIDAVIT

June 9, 1990 – The CI and S/A Norman observed by S/A Brother and U.S.C. S/A Tom Austin met Kurt WITTIE and Dennis MASON by the pool of the Holiday Inn, 10510 I-45 North, Houston, Texas. In undercover negotiations, MASON had fifteen (15) tons of marijuana to get out of Mexico. MASON would pay $165.00 per pound to fly it out. First, the load would be 6,000 pounds and then a second load in 4-5 days. MASON and WITTE agreed to furnish $30,000.00 expense money. WITTIE said that he had a stash ranch in Montgomery County and would buy a horse trailer that could hold 2,000 pounds easy.

June 14, 1990 – S/A Roger Norman and the CI met MASON and WITTIE at the Holiday Inn, I-45 North, Houston, Texas. The undercover negotiations resulted in that MASON and WITTIE would go get $30,000.00 at the ranch. At 6:30 P.M., the CI and S/A Norman met MASON at Houston International Airport. MASON gave S/A Norman $30,000.00 in the restroom at Intercontinental Airport. The CI and MASON then departed Intercontinental Airport enroute to Mexico via Tucson, Arizona.

June 20, 1990 – The CI and MASON met Tom PARKORNY in Tucson, Arizona. All departed to Mexico.

June 27, 1990 – S/A Norman and the CI met Tom PARKORNY at the Holiday Inn, I-45 North, Houston, Texas. Tom PARKORNY wanted S/A Norman to fly to Guatemala to see airstrip and fly cocaine into United States.

WITTIE currently in Denver, Colorado and MASON was still in Mexico.

July 15, 1990 – S/A Norman U.S.C.S. S/A Tom Austin, and the CI met with Tom PARKORNY, MASON and WITTIE at the Holiday Inn, J.F.K. Blvd and Beltway 8, Houston, Texas. Undercover negotiations, S/A Norman would do the Mexico deal or the Guatemala deal whichever came first.

July 23, 1990 – S/A Norman and the CI met Tom PARKORNY at the Sheraton Inn, J.F.K. Blvd and Beltway 8, Room 326. Tom PARKORNY provided $100,000.00 expense money to S/A Norman to fly 4,400 pounds of marijuana out of Oxaca, Mexico.

July 27, 1990 – S/A Norman debriefed the CI upon the return from Oxaca, Mexico. The airstrip was fine and the CI gave coordinates to S/A Norman as they were given to him by MASON.

August 12, 1990 – A seizure of 590 kilograms of cocaine and five (5) arrests including MASON and DEA Fugitive, Victor AYON-Hernandez in Oxaca, Mexico.

August 13, 1990 – U.S.C.S. S/A Tom Austin, S/A Norman and two (2) CIs met WITTIE at the Kettle Restaurant, J.F.K. and Beltway 8, Re: Oxaca, Mexico. S/A Norman advised WITTIE that the pilots were unable to land because the police had shown up at the strip with helicopters.

January 25, 1991 – S/A Norman"s called Kurt WITTIE, pager number 1-800-759-7234, pin number 24323.

January 25, 1991 – Kurt WITTIE called S/A Norman from Tucson, Arizona at (602)881-9504. WITTIE wanted 1,000

lbs. of marijuana and would call back Monday if he could raise the $50,000 for the down payment.

January 28, 1991 – WITTIE called S/A Norman from Denver, Colorado at (303)772-9838. WITTIE stated that he had the $50,000.00 for the down payment and wanted S/A Norman to give WITTE his horse trailer back so WITTIE could use it as one of his load vehicles. WITTIE would bring a motorhome from Denver, Colorado for the second load vehicle. In the undercover negotiations S/A Norman stated that he would call WITTIE late Sunday Night or early Monday Morning (February 4, 1991) and tell him when to be in Houston.

February 3, 1991 - S/A Norman paged WITTIE. When WITTIE telephonically contacted S/A Norman, WITTIE was advised by S/A Norman to be in Houston, Texas on Wednesday Morning, February 6, 1991.

February 5, 1991 – S/A Norman was paged by WITTIE and they spoke via the telephone. WITTIE advised that he was in Amarillo, Texas and had the motorhome and would be in Houston, Texas on Wednesday Morning, February 6, 1991 with the $50,000.00.

On February 7, 1991 at approximately 5:20PM, S/A Norman was paged by WITTIE. S/A Norman called WITTIE who advised he was in Dallas, Texas. It was agreed between WITTIE and S/A Norman that WITTIE would come to Houston, Texas and upon arrival, page S/A Norman.

At approximately 10:30PM on February 7, 1991, S/A Norman received a page from WITTIE. S/A Norman met with WITTIE at the Bennigan's Restaurant in the vicinity

of Interstate 45 and FM 1960 West, Houston, Texas. At approximately 12:15PM, S/A Norman called S/A Brothers and U.S. Customs Agent Tom Austin to come pick up WITTIE's motorhome which was to be used as a transport vehicle for the marijuana. Upon arrival at the Bennigan's parking lot, S/A Norman and WITTIE met with S/A Brothers and Austin in the motorhome. WITTIE pointed out all the hidden compartments in the motorhome and discussed how to hook up the horse trailer which WITTIE had previously delivered to S/A Norman, also to be used as a load container for marijuana. WITTIE gave the motorhome to S/A Norman and S/A Brothers drove the motorhome away, followed by S/A Austin. S/A Norman went with WITTIE to the room 219 at the LaQuinta Inn, 11711 North Freeway, Houston, Texas to look at the money.

Surveillance was conducted on WITTIE and KELLY all night and continued on February 8, 1991 at the LaQuinta Inn.

At approximately 10:40AM on February 8, 1991, S/A's Norman and Brothers met with WITTIE and KELLY in room 219 at the LaQuinta Inn. WITTIE introduced Sam KELLY as the driver of the motorhome. S/A Brothers and KELLY left and proceeded to the Northwest Mall, Loop 610 and 18th Street, Houston, Texas, where the motorhome and horse trailer were parked.

Upon arrival, KELLY took possession of the motorhome and horse trailer which were being utilized as load vehicles containing 1000 pounds of marijuana. The aggregate amount of marijuana placed in the motorhome and horse

trailer by undercover agents was 360 pounds. After taking possession of the motorhome and horse trailer, KELLY was arrested.

WITTIE was arrested in the parking lot of the LaQuinta Inn.

/s/ C. Brothers
Cliff Brothers, Special Agent
Drug Enforcement Administration

Sworn and subscribed to before me this 11th day of February, 1991.

/s/ George A. Kelt, Jr.
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO:
	§	H 91 33
v.	§	CRIMINAL
KURT STEVEN WITTIE	§	COMPLAINT
SAM RICHARD KELLY	§	NO. H-91-121M

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about January 25, 1991 through February 8, 1991, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, KURT STEVEN WITTIE and SAM RICHARD KELLY, defendants herein, along with others known and unknown to the Grand Jury, did knowingly and intentionally conspire, confederate, and agree with each other to commit an offense defined in Title 21, United States Code, Section 841(a)(1), namely, to possess with intent to distribute in excess of one hundred (100) kilograms of marijuana, a Schedule I Controlled Substance. (Violation: Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B) and 846).

COUNT TWO

On or about February 8, 1991, in the Houston Division of the Southern District of Texas, and within the

jurisdiction of this Court, KURT STEVEN WITTIE and SAM RICHARD KELLY, defendants herein, each aiding and abetting the other, along with others known and unknown to the Grand Jury, did knowingly and intentionally attempt to possess with intent to distribute in excess of one hundred (100) kilograms of marijuana, a Schedule I Controlled Substance. (Violation: Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B); 846 and Title 18, United States Code, Section 2).

A TRUE BILL:

/s/ Gloria J Hashr
FOREPERSON OF THE GRAND JURY

RONALD G. WOODS
United States Attorney

By: /s/ Bertram A. Isaacs
BERTRAM A. ISAACS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted In Printing)

PLEA OF GUILTY

I, Kurt Steven Wittie, Defendant in this Cause, desire to enter a plea of guilty to Count One of the Indictment returned against me. To induce the Court to accept the plea, I state to the Court, under oath, as follows:

1. I have had the benefit of counsel and have consulted fully with my counsel prior to entering this plea.

2. I understand that, regardless of my guilt or innocence, I am entitled to enter a plea of not guilty and stand trial.

3. I understand I have a right to a jury trial, the right to have an attorney assist me in trial, the right to subpoena witnesses and evidence, the right to present evidence, to confront and cross-examine witnesses, the right not to testify and the right to be convicted only by a unanimous verdict, if I should have a jury trial. Knowing these rights, I still wish to plead guilty.

4. I understand the elements of the offense, and I am entering this plea freely and voluntarily, in the exercise of my own good judgment, because I am guilty.

5. I have received no promises of leniency, or of any other nature, other than those made a part of this pleading, from my own attorney, the attorneys for the United

States or from any other person, to induce me to plead guilty.

6. I have received no threat of a more severe sentence, of harsh treatment or of any other nature to induce me to plead guilty.

7. I understand that any statement by my attorney, by the attorney for the United States, or by any other person concerning what sentence I might receive is not binding on the Court. This plea is made pursuant to Rule 11(e)(1)(B).

8. I am not under the influence of alcohol, drugs or narcotics; I have no reason to believe that I am now, or ever have been, insane or of unsound mind. I assert that I am fully competent and in full possession of my faculties.

9. I am fully satisfied with the services of my attorney and believe he has represented me ably and conscientiously in this matter.

10. I understand that no one who has been convicted of a felony offense may possess a firearm. It has been explained to me that I cannot receive a firearm now and will not be able to possess a firearm after I am sentenced.

11. I understand the penalty for Count Two [WTH KW BI] is five (5) to forty (40) in prison; a $2,000,000 fine and four (4) years supervised release after such term of imprisonment. I also understand that the Court may assess any lawful sentence, including the maximum for this offense.

12. I understand that a special assessment of $50.00 as to Count Two [WTH KW BI] of the Indictment will

be imposed on me by the Court pursuant to Title 18. United States Code, Section 3013 and is to be paid at the time of sentencing by check payable to United States Attorney's Office, 515 Rusk Avenue, Houston, Texas 77002.

13. My attorney has explained to me that after I have been released from prison, I must serve a term of supervised release.

I understand that the Judge will order, as some of the Conditions of Supervised Release that I not commit another Federal, State or Local Crime during the term of supervision and that I cannot possess illegal controlled substances. In addition the Judge will order other specific conditions that I must follow and obey while on supervised release.

I further understand that while on supervised release, the Judge may extend the term of supervised release, and may modify, reduce or enlarge the conditions. I also understand that if the Judge finds that I violated any condition of my supervised release, that the Judge will revoke such supervised release and that I will be required to serve in prison all or part of the term of supervised release without credit for time previously served on post release supervision.

14. After consulting with my attorney, I have entered into the following agreement, in the nature of a "Plea Agreement", with the United States Attorney, to this effect and no further:

I will enter a guilty plea to Count Two [WTH KW BI] of the Indictment and persist with that plea through sentencing. In exchange, the Government agrees to dismiss Count One at [WTH KW BI] at that time.

Further, I agree to cooperate in good faith with the Government by providing truthful and complete information concerning this and all other offenses about which I might be questioned by agents of law enforcement.

I understand that if I am called to testify before a Grand Jury or a trial jury concerning this information that I must not only tell the complete truth concerning any question I am asked, but I must not withhold any evidence that may relate to the guilt or innocence of any other person. I know that my response to all questions whether they be by the Assistant United States Attorney, the Defense attorney or the U.S. District Judge must be the truth. The Government agrees to file a 5K1.1 Motion for Departure at time of sentencing if my cooperation results in substantial assistance. Whether substantial compliance has been met will be determined by the Government. This includes departure below any statutory mandatory minimum sentence.

I understand that if I fail to honor my agreement with the Government to cooperate, as detailed in this agreement, the Government will be under no obligation to Dismiss Count One [WTH KW BI] and may proceed with prosecution of those charges.

/s/ Kurt Steven Witte
KURT STEVEN WITTIE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 21st DAY OF February, 1992.

JESSE E. CLARK, Clerk

By: /s/ J Richards
Deputy Clerk

APPROVED:

/s/ Bertram A. Isaacs
BERTRAM A.
ISAACS
Assistant United
States Attorney

/s/ Wm T illegible
Wm T illegible
Attorney for
Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
(Caption Omitted In Printing)
REARRAIGNMENT HEARING
BEFORE THE HONORABLE NORMAN BLACK, UNITED STATES DISTRICT JUDGE,

* * *

[1] **THE COURT:** We're going to move expeditiously in 91-33, because I have promised my friend, Judge Hearne, that Mr. Ervin will be back there very quickly. Tell me what you've got to say today.

MR. ISAACS: Yes, sir. Judge, it's just a matter of explaining the plea agreement –

THE CLERK: I can't hear you.

MR. ISAACS: – I'm sorry, to the Court; and I don't know whether it was a matter that needed to be recorded or not; it's up to the Court.

THE COURT: All right.

MR. FLOOD: Your Honor –

THE COURT: I thought you were out?

MR. FLOOD: Well, I – I am, Your Honor, except that I – I want to argue that pretrial disclosure – no. I am out, Your Honor. But I was the one who was really a party to all the plea agreements. I want to ensure Mr. Habern understood it and the Court understood it. And Mr. Isaacs and I have really been the one that have discussed the plea agreement. Also, I kept getting a call

from your Courtroom Deputy, Your Honor, to be here and then I didn't want to be in violation of your Order.

THE COURT: Well, you're not going to be any problem, as long as you're satisfied Mr. Habern is certainly well qualified to handle this matter.

MR. HABERN: Thank you, Your Honor.

[2] **MR. FLOOD:** Absolutely, Your Honor. Absolutely. Well, if I may just be here for the plea –

THE COURT: Oh sure. sure.

MR. FLOOD: – for the discussions about the plea. Let me – let me tell you, since we're speaking about that issue. On the plea of guilty, it had to be amended – if you notice where the defendant, Mr. Witte, and I assume Mr. Kelly will be pleading to Count II rather than Count I and related to that is the following agreement, Your Honor. Even though it is not reflected in the plea of guilty. That is that they would plead to Count II of the indictment, that is, the possession in excess of 100 kilograms. That the amount possessed would be the actual amount possessed, which I believe was in the neighborhood of 370 pounds, is that correct, Mr. Isaacs?

MR. ISAACS: Well, Your Honor, if you want me to continue, that's only what's actually there, Your Honor. But I want to make it clear that the government stipulated how much was in that vehicle with respect to – this is like anything else in a plea agreement, when the PSI comes out there may be some relevant conduct issues which the court may want to take into consideration or

disregard. But we are stating on the record that the factual basis is that what was contained in that vehicle was approximately 375 pounds of marijuana –

MR. FLOOD: Right.

MR. ISAACS: – which they actually took possession of.

[3] **MR. FLOOD:** And we – Mr. Isaac's and I have discussed the sentencing guideline range for that and everything. What I'm concerned about, is this relevant conduct issue. Because apparently, there is discussion about 1000 pounds and also as the Court's aware there was a previous case that the government has contended all along had nothing to do with this. And that's – I assume still maintains had nothing to do with this. But I don't want the presentence report coming back with the previous case as relevant conduct, and the discussions surrounding the conspiracy is relevant conduct. So I wanted there to be an agreement now, so that we don't run into some problems with the probation department, that the amount possessed is 300 and something pounds, that's the guideline calculation range, that the so-called kilos of cocaine that are down in Oaxaca, Mexico that a guy by the name of Dennis Mason was arrested on, are not calculated into Mr. Witte's guidelines, and that – that's my concern?

THE COURT: Well, as you know, neither you, nor I, nor the probation officer is bound by what the probation officer finds out.

MR. FLOOD: Unfortunately, I understand that.

THE COURT: The government of course could agree that they would be willing to allow a downward departure to the amount actually possessed.

MR. ISAACS: Your Honor, with respect to first – [4] respect to stipulating to an amount for the purposes of relevant conduct, I don't think I can in good faith talk about that. On the other hand, I might also state to the Court, that Mr. Witte has been living up to his agreement to provide information to the government. If he continues with that through sentencing, I anticipate that he – that the government will be filing a motion for purposes of the downward departure.

THE COURT: I understand that.

MR. ISAACS: Again, and I say this respectfully, the decision is going to be let up to the Court as to what the sentence is going to be on Mr. Witte. The government can only state the facts as they come out. But I do not intend by any statement here to try to usurp the – what the gov – the Court and the probation department will be doing.

THE COURT: Well, remember of course, that if the probation officer says that the guidelines require a calculation on the basis of a 1000 pounds because they discussed it and I decide to sentence on the basis of 350 pounds, it's up to the government whether they want to appeal.

MR. FLOOD: Right. Right.

THE COURT: You're hearing an agreement that they're not going to in affect?

MR. FLOOD: That's correct.

THE COURT: Isn't that right, Mr. Isaacs?

MR. ISAACS: Yes, Your Honor. Basically whatever the [5] Court decides we will not probably appeal on that issue.

MR. FLOOD: Okay. U.S. Attorney has received some serious problems in the Valley especially trying to stipulate to lower amounts and the Attorney General has gotten upset about it. I intend to follow the law. But I pretty strongly understand that there's a lot of conversation that goes on in these cases, that's really just conversation.

MR. FLOOD: I just wanted to cle – it's not reflecting the plea of guilty, Your Honor.

THE COURT: I think I understand you completely, Chris, I don't see any problem with that.

MR. FLOOD: Also, and then I'm going to leave you alone, Mr. Witte has, I understand met with the agents once. That Mr. Habern was present during that and it's my understanding that the agent is requesting further assistance from Mr. Witte, and in order to provide that assistance it is imperative that he be out pending sentencing, so that he can have potential conflict with – not conflict, potential contact with an individual that they're allegedly talking about.

THE COURT: I understand.

MR. FLOOD: And I know that, only because I have discussed that with the agents. And I just want to tell the Court that, because I know that's going to become an issue while I'm gone. And I want to tell the Court what I know about that issue.

[6] **THE COURT:** I do not see any problem, if the government doesn't?

MR. ISAACS: Your Honor, for the record, what Mr. Flood is relating to the Court, is something that I am not aware of. And based upon my understanding of this case, the government believes that the Court follow along with 3143 and that I don't see any – I'm not making any such motion for that. I do not know of any basis on what – which Mr. Witte should be continued upon, at this point in time. So that is – unless there's – unless someone were to contact me concerning that matter, and I have talked with the agent as late as last week and no one has given me that impression at all.

MR. FLOOD: Well, in that regard, Your Honor, I'm –

MR. ISAACS: I'm not just – I'm not going to say that maybe something may not have been implied, but I believe it is encumbent upon me as the U.S. Attorney that has represented the government to have such information and that such a request be made, and no such request has been made.

MR. FLOOD: And I'm not saying that the agent is requesting it, Your Honor. And I want to make sure that the Court's under – aware what I am saying. I was talking with the agent about the cooperation in – if it becomes necessary. There is an agreement also, Your Honor, in this case, that if Mr. Witte is able to produce someone, that a recommendation of the government is going to be much lower than if he doesn't produce someone. [7] You see what I'm talking about, Your Honor?

THE COURT: Yes, sir.

MR. FLOOD: And so, I was talking with the agent about producing that person and he said, well you know he hadn't had any contact with him. We're hoping that he'll have contact with him soon, and I said, well, he'll have to be out to facilitate that conduct – that contact. And he said, yeah, he will. And so, I don't mean to be representing that the agent wanted me to speak for him and ask that he be released pending sentence. only saying that in order to cooperate, as he's agreed to do, it may be necessary for him to be released pending sentence. Now, 3143 as the Court's aware, states that if the sentence, under the statute for which he's being prosecuted and if the Court doesn't believe there's going to be an acquittal or anything like that, or a new trial, then the Court has to order him detained. However, in this case, it's a little different because there's going to be a 5K, Your Honor. So we don't even know whether or not there will be a recommendation as to a sentence of imprisonment, one.

MR. ISAACS: Your Honor?

MR. FLOOD: And, two, well – and, Bert, I'll give you a chance to respond. We had the same hearing in front of Judge Hittner not too long ago. And, two, it would facilitate his cooperation that he be released pending sentence. Now, he's not a danger to community and he's not a flight risk. The Court's [8] already found that in the giving of a bond to begin with. Mr. Witte has provide – abided by all the terms of his release, never has been a problem at all on release. Mr. Witte hasn't. And I'm just trying to tell the Court that I'm a little bit familiar with

what he's trying to get in this case, how much assistance he's trying to provide, and that assistance would be thwarted if he was to be held pending sentence. Basically, the agreement is, if he can get another individual who's in this indictment in here, and charged, the government is going to recommend three years, as a cap. If he can't, they're just going to give him a 5K. Do you see what I'm –

THE COURT: Yes, sir, I do.

MR. FLOOD: Right. And – and from what I understand, is this individual that he's supposed to be cooperating with is going to contact him. Well, he – you and I know that he can't be contacted while he's in the Harris County Jail pending sentence. So, that's – the way that I've gotten around that section of 3143 before, Your Honor – I don't mean to use the word "gotten around," but the way that the Court can interpret it is, one, because there is a 5K in the case, the government doesn't know whether or not they're going to be recommending jail time, two, because of cooperation, the amount of time that is going to be done is much less than the ten years as contemplated by the statute and so that it shouldn't fall under that statute. And then finally, his cooperation that he's agreed to do as part [9] of his plea of guilty, is thwarted because of his having to be in jail. So he's sitting here waiving his right to trial, waiving everything, pleading guilty, saying I'll cooperate, and then if the Court orders him to jail, he won't be able to cooperate. So that's why we're asking that he be released. This is all premature and I'm sorry to get into this, but it's just that I'm going to be leaving.

THE COURT: I'd rather have it thrashed out now, than later.

MR. ISAACS: Your Honor, one may it please the Court?

(Pause)

THE COURT: I don't like to race through this thing with Mr. Ervin needing to be in Judge Hearne's Court. Would you all like for me to recess this thing over the weekend?

MR. ISAACS: Your Honor, there's also – there's some other matters which – I really would like to get this – no, we've reset this several times.

THE COURT: I would too.

MR. ISAACS: The issue of – first of all, this is a Class B felony and under the statute 3561 it is not probatable. Period. There is no probation that can be involved here under Class B felony.

MR. FLOOD: It's a 5K.

MR. ISAACS: Even if there's a 5K, it is not probatable. That is the – that is the law and under the sentencing [10] guidelines, it says a Class B felony is not probatable.

MR. FLOOD: Well, I don't know that a 5K can avoid statutory restrictions, Your Honor. I understand that a 5K can avoid statutory restrictions?

MR. ISAACS: It does. It goes under – it allows the Court to go under a mandatory minimum. The 3561 is

explicit on itself. It says A and B felonies are not probatable. And that has been the interpretation of this District, the probation department and I –

THE COURT: Yes, we know, we also know that there's time and then there's time.

MR. ISAACS: But – and the bottom line, Your Honor, is that I think we've known this from – what Mr. Flood is talking about is something that I am not aware of. He has known from the day one, from the last time we were here, that the basis upon which we postponed this plea, was to permit these gentlemen to get their matters in order because upon plea, the agreement was, or the understanding was that the government was going to ask the Court to follow Title 18, Section 3143, and that these gentlemen would be incarcerated.

MR. FLOOD: I understand it, Your Honor, and that was our agreement. But, now it keeps him from abiding by the terms of his plea of guilty –

MR. ISAACS: Your Honor, I think –

MR. FLOOD: – if he's incarcerated?

[11] **MR. ISAACS:** Your Honor, that is not up to Mr. Flood to determine how much – how substantial assistance would be given. I think I've already stated on the record, for purposes of this, that Mr. Witte has done a substantial amount. If in fact, the government does not intend to question him any more, he – I expect he will probably get a – he will get his 5K. If we intend to question him any more and refuses to cooperate, that may be a basis, but at this point in time, he has done everything that we have asked so far; and if we ask him

any more, of course, he must continue through sentencing. But if we don't ask him of anything any more, he is going – I anticipate we're going to file that motion for the 5K. And it will come to this Court. But that – whether or not we want to continue any more with questioning of Mr. Witte is –

THE COURT: I think I'm primarily concerned, as is Mr. Flood, with whether he is presently eligible for continuation on bond, if he should plead guilty today? That's the only thing we're concerned about?

MR. FLOOD: Right. And I think that he is. And I think because of the 5K, the Court can find that there may be a possibility that there won't be a recommendation of jail time, and therefore 3143 can apply. And we had the same argument in front of Judge Hittner recently. And he – his exact ruling was, I understand your argument, I'm going to release him, but if Mr. Isaacs wants to appeal this case, it sounds like an issue right [12] for appeal. In fact, I think he requested that he appeal it and I'm glad that he didn't because I don't know what – what's going to happen these days with the Fifth Circuit. But, let – let me say this, Your Honor, very succinctly. If Mr. Isaacs is recommending to the Court right now that he is going to make a three year cap on this because he was able to bring in somebody, then fine, we'd say go – all right, we'll go start serving our time now. The problem is, is Mr. Isaacs is not going to make that recommendation unless he brings in this individual. He can not bring in this individual while he's in jail. And he cannot even contact this individual, he and agent – the agent in this case have decided that that individual is more than likely contact him. And he won't be able to be contacted if he's

in jail. And so it deprives him of that second part of this plea offer which is that he will get a three year cap if he is able to bring that other individual in.

THE COURT: Well, we are getting the cart before the horse, here.

MR. FLOOD: Yeah. And I'm –

THE COURT: I'm hearing that you think he's eligible to continue on bond and Mr. Isaacs is not sure whether he is or not. I think I can resolve the question very easily.

MR. ISAACS: Your Honor, may I be in – respectfully, I'm saying not that he's – I'm not sure, I do not believe he is.

THE COURT: All right.

[13] **MR. ISAACS:** Okay.

THE COURT: All right.

(Pause)

THE COURT: What do you all want to do? You all want to bring him up now, or not?

MR. FLOOD: Yeah, we can bring him up now, Your Honor.

THE COURT: All right. Come on up, gentlemen.

MR. ERVIN: Well, Your Honor, with regard to my defendant –

THE COURT: All right.

MR. ERVIN: – I had filed a motion to continue this hearing because, frankly, he is someone other than the individual named in the indictment. He has not been debriefed by the government yet. He has come forward with this information to me while I have been in this other trial.

THE COURT: All right.

MR. ERVIN: I have not been able to give this – this matter the attention that I would like to give it. I hear Mr. Isaacs saying this morning that he's willing to go through with the plea bargain, which is the same bargain that Mr. Flood describes.

THE COURT: I have no problem with continuing your matter. I don't want to rush your matter at all.

MR. ERVIN: Well, hopefully, Your Honor, he can be debriefed before he comes back in here.

[14] **THE COURT:** Well, let's have –

MR. ERVIN: He's committed –

THE COURT: – let's have Mr. Witte and Mr. Kelly come forward.

MR. ISAACS: Your Honor, there is another matter with respect to Mr. Kelly that (indiscernible).

THE COURT: I'm well aware of it. Mr. Kelly, your attorney is asking for addi – for some additional time so you that you can perhaps make some sort of arrangement with the agency. Is that satisfactory with you?

MR. KELLY: Yes, sir, it is, Your Honor.

THE COURT: I would be willing to reset it for a very short period of time?

(Pause, Court and clerk conferring/whispering)

THE COURT: Two weeks. Are you going to still be in trial?

MR. ERVIN: Gosh, I hope not Your Honor. This – the original projection on this was three weeks. We're now starting the sixth week next week and I haven't put on my case yet. So it's –

THE COURT: I'd – di –

MR. ERVIN: I – I'm hoping that it will be through in two weeks.

THE COURT: Does Judge Hearne work five days a week?

MR. ERVIN: Yes.

[15] **THE COURT:** I could set it in a late – at a late afternoon setting, or I could set it at a noon setting. But I want to get this thing moved in two weeks.

MR. ERVIN: Well, by late afternoon, you mean after 5:00, Your Honor?

THE COURT: Yeah.

MR. ERVIN: Somewhere around 5:30 or something? That would be ideal. Two weeks from now, that should give us plenty of time to accomplish –

THE COURT: Not on Friday, but how about on Thursday, two weeks from now?

CLERK: At noon, Your Honor, or 5:00?

THE COURT: Well, 5:30 would be better, or 5:15. Let's say 5:15.

MR. ERVIN: Yes, sir.

CLERK: Okay, that would be on March 5th.

MR. ERVIN: Yes, sir.

THE COURT: All right. Now that raises the next problem. Mr. Kelly has fallen out of repute with the New Directions Club. He's been drinking, he has violated the terms of the probation, and I am very concerned.

MR. ERVIN: May I say something about that, Your Honor?

THE COURT: Yes, sir. I also have the letter from Mr. Wallace indicating that he has a place to stay.

MR. ERVIN: Okay, Your Honor. Mr. Kelly has come to [16] see me several times since I have been in this trial in late afternoon and has been wringing his hands and distraught and distracted and – I really couldn't understand what the matter was, but I think what he was doing was working out in his own mind what he had to do, which was to – facing this business of 5K and debriefing, coming totally clean with the government and straightening his life out. He has a different identity. He's committed to that proposition now. He's – he's a different person now than he was before he came and told me this and we had decided what his course should be. I believe that the reason he was drinking and everything, is that he was emotionally distraught over the prospect of trying to

walk some kind of tight rope through all these proceedings and maintain an identity that's not his own. He's committed to exposing his identity and leveling with the government completely and cooperating in whatever way he can. And that together with the fact that he's been a good worker, has a place to stay. Harris County Jail is over crowded as it is. He's facing a 5K situation where he may very well need to be out of jail to accomplish something that could help him. But he hasn't been debriefed yet.

THE COURT: Have you seen his fingerprint return?

MR. ERVIN: No, sir.

(Pause)

THE COURT: I have been furnished a copy of the fingerprint return which indicates that the person with the same [17] fingerprints of Sam Richard Kelly has been known as Ralph Christopher Neal, has had a number of arrests and convictions under that name, has been known as Donald Lee Morton and has an arrest under that name. I can't let this man stay out on bond. There's no way in the world. I've got to revoke his bond. He's in custody of the Marshal, and we'll reset that until the date Ms. Richards just gave you. If you need some time, I'll give you the time.

MR. ERVIN: Yes, sir. I appreciate that.

THE COURT: But I think you need to get with the agent right away.

MR. ERVIN: Yes, sir.

THE COURT: I know how pressured you are. Get back there, to Court.

MR. ERVIN: Okay.

THE COURT: All right. You may stand aside, sir, Mr. Kelly. Well, let's talk to Mr. Witte now. Mr. Witte, have you been involved in all of these conversations and heard what we've been talking about as far as all of this, where you're going to fall in the Sentencing Reform Act and all of those problems?

MR. WITTE: Yes, Your Honor.

THE COURT: All right. Do you want to proceed with rearraignment at this time?

MR. WITTE: Yes, Your Honor.

THE COURT: All right, sir. First thing I'm going to [18] do is have you sworn in.

(The Defendant is sworn)

THE COURT: All right, sir, you understand that you're now under oath. I'm going to ask you some questions and the answers you give me must be truthful. If you fail to give me truthful answers, you can be charged with perjury. Do you understand that?

MR. WITTE: Yes, Your Honor.

MR. HABERN: Your Honor?

THE COURT: Yes, sir.

MR. HABERN: I will file a Motion on the matter, but I just learned this morning there's a misspelling of his name; the "I" at the end of his name should not be there.

THE COURT: All right let's go over that very carefully. Is your name Kurt Steven Witte?

MR. WITTE: Yes, Your Honor.

THE COURT: Do you pronounce it Witte?

MR. WITTE: Correct.

THE COURT: First name is spelled K-U-R-T?

MR. WITTE: Correct.

THE COURT: S-T-E-V-E-N?

MR. WITTE: Yes, Your Honor.

THE COURT: W-I-T-T-E?

MR. WITTE: Yes, Your Honor.

THE COURT: All right, Sir. Mr. Witte, how old a man [19] are you?

MR. WITTE: Thirty-nine years old.

THE COURT: And how much education have you had, Mr. Witte?

MR. WITTE: Um, completed high school education with a semester of college and real estate training.

THE COURT: All right. Have you ever been treated for drug addiction or mental problems?

MR. WITTE: No, Your Honor.

THE COURT: Have you come here today under the influence of any drugs or alcohol?

MR. WITTE: No, Your Honor.

THE COURT: Taken any medicine that might affect your mind?

MR. WITTE: No, Your Honor.

THE COURT: You've been represented by two very fine lawyers, Mr. Flood and Mr. Habern. Have you had a chance to go over this case carefully with both of them?

MR. WITTE: Yes, Your Honor.

THE COURT: Are you satisfied with the services and advice that they've been giving you?

MR. WITTE: Yes, Your Honor.

THE COURT: I understand now you have entered into a plea agreement with the government. Let's go over it once and for all to make sure it's understood. You've agreed to enter a [20] plea of guilty to Count II of the indictment and I'm going to go over the terms of Count II. That if you persist in that plea through sentencing, the government will dismiss Count I. Further, you are agreeing to cooperate in good faith with the government by providing truthful and complete information concerning this and other inferenc – offenses about which you might be questioned. If you're called upon to testify before a grand jury or in a trial concerning this, you will tell the complete truth. You will not withhold any evidence. The answers you give to any questions asked you will be the truth. If you satisfy the government that you have done that, the government will file a Motion to depart downward under the guidelines if you have substantially assisted. This would include departure below any mandatory minimum. And of course, if you fail to

honor that agreement, the government will not dismiss Count I and can proceed against you under Count I. Is that the plea agreement as you understand it?

MR. WITTE: Yes, Your Honor.

THE COURT: Mr. Habern, Mr. Flood, is that the plea agreement?

MR. HABERN: It is, Your Honor.

THE COURT: And, Mr. Isaacs?

MR. ISAACS: Yes, sir.

THE COURT: Other than that plea agreement, Mr. Witte, has anybody threatened you, coerced you or forced you in any way [21] to get you to plea guilty?

MR. WITTE: No, Your Honor.

THE COURT: Mr. Witte, this is a felony to which you are pleading guilty. No matter what the sentence I may give you, there are going to be some consequences to a plea of guilty to a felony. You're going to lose the right to hold public office, the right to serve on a jury, the right to vote and the right to possess fire arms. Do you understand that?

MR. WITTE: Yes, Your Honor.

THE COURT: All right, sir. Now, this case involves an offense which alleges – allegedly took place on or about February 8, 1991, and that means the Sentence Reform Act is in effect. And let me tell you how that's going to work. If you plead guilty, as you tell me you're doing here today, I will have the probation officer prepare a report. And the probation officer whose an

officer of the Court, doesn't work for the government, doesn't work for your side, will give us a presentence report. Your lawyers and Mr. Isaacs will have a chance to look at that report. That report will tell me all about you and all about this offense. And one of the issues that is going to be of great concern in that report is how much of the illegal product you're charged with. Because these guidelines scale the range of offenses based upon quantity among other things. And we're going to have a disagreement perhaps, between your lawyer and the government about how much you should [22] be charged with, as far as quantity. And I will resolve that at the time of sentencing. It's a fact question that I have to decide based upon what your lawyers tell me, and what the government's lawyers tell me, about the amount involved. That is, whether you should be penalized for the actual amount that you all dealt with, or in a greater amount because you discussed it or had it available or it was reasonably contemplated that it was involved in the case. Do you understand that?

MR. WITTE: Yes, Your Honor.

THE COURT: It's kind of complicated. Now, under the Sentence Reform Act, once the probation officer has made these calculations, they will tell me that there is a minimum sentence and a maximum sentence that I ought to sentence you within. The government, if they file that Motion for Downward Departure, will permit me to go below those guidelines. How far below those guidelines will depend upon the law, how I see the law, and how we all argue it out at the time of sentencing. And I'm not going to tell you right now whether this is a probatable offense, whether there's any chance of you

getting probation, because I'm not sure. Mr. Isaacs takes a position that there is no chance for probation. Your attorneys take the position that there is a chance for probation. But the one thing that I want you to understand is, I bear the responsibility of making the determination. If you don't like the way I sentence you, you have a right to appeal that sentence to the Court of Appeals. [23] And they may tell me I'm right, or they may tell me I'm wrong and send the case back for sentencing again. The government has a right to appeal the sentence if I go below the guidelines and they haven't requested me to do so. It's a little complicated. But I want you to understand. You have a right to appeal the sentence but you don't have any right to withdraw a plea of guilty, once you enter it. Do you understand that?

MR. WITTE: Yes, Your Honor.

THE COURT: I want you also to understand under the Sentence Reform Act, if you get a term to serve, you'll serve that term, because there's no longer any parole. It's been abolished. Do you understand that?

MR. WITTE: Yes, Your Honor.

THE COURT: Okay, sir. Now, you of course have a right to go to trial in this case on a plea of not guilty. At a trial it would be up to Mr. Isaacs to call witnesses and prove your guilt beyond a reasonable doubt. Your lawyers would not have the opportunity or the responsibility of proving that you're not guilty. That's not your burden. You could testify at a trial if you wanted to. But no one can force you to testify against yourself. If you wanted to bring witnesses to the Court to testify in your behalf, I could order those witnesses to appear. But

the main thing you should understand is, it would be up to the government to prove your guilt, beyond a reasonable doubt. Not your burden to prove that you're not guilty. Now, if you [24] plead guilty, as you tell me you want to do here today, there'll be no witnesses called, there will be no trial, no jury. In addition, you're going to have to admit what you did in connection with this Count II. Do you understand what your giving up by pleading guilty?

MR. WITTE: Yes, Your Honor.

THE COURT: All right, sir. Now, Count II of this indictment charges that on or about February 8th, 1991, here in the Houston Division, of the Southern District of Texas, you and Mr. Kelly aiding and abetting each other, that is assisting and helping each other, along with others, known and unknown to the grand jury, did knowingly and intentionally attempt to possess with intent to distribute more than 100 kilograms of marijuana, a scheduled one controlled substance. Now what this means is you're charged with aiding and abedding, that is, helping Mr. Kelly or his helping you, and other people perhaps, trying to, attempting to, possess this quantity of marijuana which is of course a Schedule I controlled substance. The government would have to show, since it's an element of the offense, that you did this knowingly and deliberately. That you did it intentionally. That is, you didn't do it by mistake, you didn't do it by accident, you did it knowing you were violating the law. Now, do you believe you understand what you're charged with?

MR. WITTE: Yes, Your Honor.

THE COURT: Attempting to possess? All right, sir. [25] Now, I am of the opinion that this carries a minimum sentence of five, is that correct?

MR. ISAACS: Yes, Your Honor.

THE COURT: And a maximum sentence of 40 years plus a possibility of a $2,000,000 fine. In addition, there's a requirement of four years of supervised release and a $50 special assessment. Now, what that means is, unless the government moves for me to depart downward, there's a minimum sentence of five years required under this Count and a possible maximum of 40 years. A possibility of up to $2,000,000 fine if I determine that there is a possibility of paying a fine. In addition, after any term of imprisonment, you will be on a form of probation called supervised release for four years. During that period of time, you can't possess fire arms, or violate any laws or any other terms of probation, or you can be brought back to court and sentenced to imprisonment again, with no credit for any time served. Do you believe you understand that?

MR. WITTE: Yes, Your Honor.

THE COURT: All right, sir. Now, what do the facts show, Mr. Isaacs, with regard to Mr. Witte?

MR. ISAACS: Your Honor, I anticipate the government would put to its proof. It would present witnesses that on or about the 25th of January, a special agent from DEA, Special Agent Norman, was contacted by the Defendant, Kurt Witte, via pager. Mr. Witte had talked to the undercover agent and talked [26] about purchasing a quantity of marijuana. That he stated that he

wanted to be sold to him by who he believed to be a drug dealer, the special agent. The quantity that was discussed at the time was a 1000 pounds. And that Mr. Witte subsequently talked – that telephone conversation, by the way was recorded, Your Honor. That on the 28th of January, 1991, Mr. Witte and Special Agent Norman contacted each other again for continuing negotiations concerning that amount. Mr. Witte indicated during that conversation, that he had raised the $50,000 and that there was a horse trailer which would be involved as part of this particular trade, this deal. And there would also be a motor home that Mr. Witte would use as a load vehicle that would be delivered. On the 5th of February, 1991, Agent Norman was again contacted by Mr. Witte. They spoke during the telephone (sic) again, and Mr. Witte had advised that he at that point in time, he was in Amarillo and that the motor home would be in Houston on Wednesday morning, February 6th, with the 50,000 in cash. On February 7th, again there was another contact with Mr. Witte here in Houston. And there the – there was surveillance, the deal was cut, a delivery was made of the load vehicle, the agents took the load vehicle and loaded it with 375 pounds of marijuana.

(Pause, whispering)

MR. ISAACS: I'm sorry, Your Honor. Prior to that, there was a meeting on the February 7th – I take that back – [27] in which Mr. Witte introduced Agent Norman to co-defendant, Mr. Kelly. There Mr. – and during that – also during that period of time, Mr. Witte had – was shown showed Special Agent Norman approximately $25,000 in cash. And this was at the La Quinta Inn on North Freeway here in Houston. At approximately 10:40

on February 8th, Special Agent Norman and another Special Agent Brothers, met with Mr. Witte and Mr. Kelly in Room 219 at the La Quinta Inn. Witte introduced Sam Kelly as the driver of the motor home, there was also some discussions concerning this particular deal. Special Agent Brothers and Kelly left and proceeded over to a mall where the motor home and the horse trailer were parked. Special Agent Norman remained with Witte at the La Quinta where again he was shown the $25,000 in cash. The motor home was then taken into possession by the DEA. At that time it was loaded with 375 pounds. It was then brought back. Upon arrival, Mr. Kelly took possession of the motor home and the horse trailer which were being utilized as load vehicles. And after taking possession of the motor home and the horse trailer, Mr. Kelly was arrested, afterwards, Mr. Wris – Mr. Witte was then arrested in the parking lot of the La Quinta. He was still in possession of the 25,000 and that was also seized as evidence.

MR. HABERN: May we be heard in response to that for a moment, Your Honor.

THE COURT: Sure.

[28] **MR. HABERN:** I'd like the Court to know that Mr. Witte only produced $25,000. He never produced the $50,000. And as to the amount, the 375 pounds, we don't dispute that. We don't know, my client never saw that amount, nor did he see the weed.

THE COURT: We know that it was more than a 100 pounds?

MR. HABERN: We know it was more than 100.

MR. ISAACS: Yeah.

MR. HABERN: The guy started grabbing him under the fence, Your Honor, yes.

THE COURT: I understand.

MR. ISAACS: What – excuse me, Your Honor.

THE COURT: Mr. Witte –

MR. ISAACS: More than 100 kilos.

THE COURT: I – more than 100 kilos.

MR. HABERN: I mean, 100 kilos right?

THE COURT: Which is 220 pounds. Mr. Witte, are those facts substantially what happened? If there's any part of it, you disagree with it, tell me?

MR. WITTE: Well, through out the course of the whole thing, the DEA agent was the one that initially made the contact with me. I did not initiate contact.

THE COURT: All right, sir. Other than that, was that pretty much what happened?

MR. WITTE: Yes, Your Honor.

THE COURT: All right. Are you pleading to this [29] indictment voluntarily, Mr. Witte?

MR. WITTE: Yes, Your Honor.

THE COURT: And, nobody's coerced you, nobody's forced you, nobody's promised you anything to get you to plea guilty of the –

MR. WITTE: No, Your Honor.

THE COURT: All right, sir. How do you plead to Count II of this indictment, guilty or not guilty?

MR. WITTE: Guilty.

THE COURT: Well, you're certainly a competent person, Mr. Witte, and I am going to find that you have entered a voluntary plea containing all of the essential elements. I'm going to set sentencing in this case for May the 8th, at 10:00 a.m. The government still take the position that this is not – that he is not eligible to continue on bond?

MR. ISAACS: Yes, sir.

THE COURT: I would like to ask, Mr. Grimaldo, have you been dealing with Mr. Witte?

MR. GRIMALDO: No, sir, Your Honor, we have not. However, if he continues on bond, our Pretrial Officer will continue to supervise him. I'm not sure if he's here in Houston?

MR. HABERN: He's in Colorado.

THE COURT: He's still in Colorado?

MR. HABERN: He owns a business there, Your Honor.

(Pause)

[30] **THE COURT:** Well, over the government's objection, I am going to believe – I am going to find that he is – he has by his continued cooperation remained eligible to stay on bond. If it should turn out I'm incorrect, I'm sure I will be disabused of my present belief. I will permit you to stay on bond –

MR. WITTE: Thank you.

THE COURT: – Mr. Witte. With that, we'll stand in recess. Mr. Kelly is remanded to custody. Do we have – let's see do I have the original of the plea of guilty form? I believe I do. It's the one that's already edited here. Yes. Let's have that signed.

(Pause)

THE COURT: Yes. Mr. Habern, we're going to give you a set of our standard conditions of supervised release.

MR. HABERN: Thank you, Your Honor. I'm – I am familiar with them.

THE COURT: I'm sure you do have them.

(Pause)

THE COURT: Mr. Flood and Mr. Habern, it would behoove you to stay in very close contact with the agent to make sure that the agent is cooperative when the issue of continued bond is raised.

MR. FLOOD: Yeah, that matter, and I think also matters dealing with what we discussed here today.

THE COURT: Continued cooperation. All right. That [31] concludes this proceeding. We'll stand in recess.

MR. FLOOD: Thank you, Your Honor.

MR. HABERN: Thank you, Your Honor.

MR. WITTE: Thank you, Your Honor.

(End)

(Certificate Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted In Printing)

(Filed Aug 13, 1992)

SENTENCING

BEFORE THE HONORABLE NORMAN W. BLACK, U. S. DISTRICT COURT JUDGE

* * *

[1] **THE COURT:** All right. Let's take *United States versus Sam R. Kelly* first. Mr. Ervin for Defendant.

MR. ISAACS: Your Honor, Bert Isaacs representing the Government.

THE COURT: Mr. Isaacs for the Government. All right. I understand the Government has a motion in this case. Is that correct?

MR. ISAACS: Yes, Your Honor. Pursuant to our Plea Agreement, Your Honor, the Government had agreed that if Mr. Kelly would be – be willing to debrief with the Government and talk about this or any other matters, that at sentencing the Government would submit to the Court a 5K recommendation without any recommendation on sentencing. And at this time it's the Government's position that Mr. Kelly has lived up to his part of the agreement, and he's always been ready, willing, and able to testi – to cooperate with the Government and has never ever reneged on that promise.

THE COURT: No objection, Mr. Ervin?

MR. ERVIN: No objection, Your Honor.

THE COURT: All right. Mr. Kelly, on the Government's representation that you have been willing to testify in this case and that you are continuing to cooperate, I'm going to grant the Government's Motion to Depart Downward from the guidelines. I'm sure Mr. Ervin has explained what that means to you.

DEFENDANT KELLY: Yes. He has, Your Honor.

[2] **THE COURT:** All right. Have you gone over the Pre-Sentence Report with him, Mr. Ervin?

MR. ERVIN: Yes, sir. I have.

THE COURT: All right. Familiar with all of that?

MR. ERVIN: Yes, sir.

THE COURT: All right. I notice you have some objections in the case. Let's go over those briefly. I'm not sure that they are as significant now, the Government having moved to depart downward, as they might have been.

MR. ERVIN: Yes, sir.

THE COURT: One of your objections is, of course, that there is testimony – there is information in the Pre-Sentence Report that relates to other alleged transactions that Mr. Witte is – I mean, Mr. Kelly is not involved with but Mr. Witte, his co-defendant, is allegedly involved with. And certainly that information is not relevant to Mr. Kelly and will not be considered in any way against him. So your motion, or your objection to that part of the report as to Mr. Kelly is sustained.

MR. ERVIN: Thank you, Your Honor.

THE COURT: I believe that covers all of your initial objections. Your –

MR. ERVIN: Just as to Number #7, Your Honor, an argument that the Court is – is well aware of and that had been discussed previously, that – that the relevant conduct should concl – include intent to possess – possession with intent to – attempt [3] to possess with intent to distribute 375 to 380 pounds of marijuana rather than considering the thousand pounds that was originally discussed. The rationale being that that is the amount actually possessed, and I don't believe that discussion of – of a thousand pounds is relevant conduct.

THE COURT: I disagree. I would overrule that objection. I think those discussions did involve a thousand pounds. I'm going to make sure, however, that it is not relevant to the sentencing; but I do believe it's relevant conduct under the guidelines.

MR. ERVIN: Thank you, Your Honor.

THE COURT: You're also objecting to the limited scope of his participation and believe he should be given credit for minor partici – being a minor participant. I think the fact that his participation is limited only to the amount of drugs involv – or the amount of marijuana involved in this case sufficiently limits his participation. And that giving him a minor participation would give him too much reduction.

MR. ERVIN: Yes, sir.

THE COURT: I understand this prior conviction only involved verbal assa – verbal assault and not physical assault?

MR. ERVIN: Yes, sir.

THE COURT: That's noted. The fact that he was not under sentence of probation when the incident offense was committed –

MR. ERVIN: Yes, sir, I fail to see how he was under a sentence of probation at the time the offense was committed. It [4] may be that the Probation Officer is considering the one-year probation that he got subsequent to the time that the offense was committed in determining that. But I just don't see how he's under a sentence of probation when this offense was committed.

THE COURT: Let's see. He was placed on one year's supervised probation October 3, 1991.

MR. ERVIN: That would – and the offense is February of 19 –

THE COURT: How about that, Mr. Vela?

MR. VELA: Your Honor –

THE COURT: Are we – you understand what we are discussing now is whether at the time of this alleged offense he was still under probation for his October, 1991, conviction?

MR. VELA: It does not ap – it would not appear that he was, Your Honor, now that he made this – he's corr – he's correct on this matter. Being that he was arrested under his alias, another alias –

(Off the Record whispering)

THE COURT: He was indicted for Count Two on or about February 8, 1991. So I assume he was not then on probation. He was placed on probation later.

(Off the Record whispering)

THE COURT: Is that correct?

MR. VELA: Yes, Your Honor.

THE COURT: I think that is correct. All right. That [5] objection is sustained.

MR. ERVIN: That would reduce, Your Honor, his – his criminal history category from a Four to a Three.

THE COURT: All right.

MR. ISAACS: Just so the record is clear, Your Honor, this offense that was part of the – that offense was committed while he was on bond –

MR. VELA: For the instant case.

MR. ISAACS: – for the instant case.

THE COURT: The other offense was allegedly committed when he was on bond in this case, rather than the other way around?

MR. ISAACS: Yes, sir.

MR. VELA: Yes, sir.

MR. ISAACS: Correct.

THE COURT: I see. All right. So if he's at a Level 26 Category 3, he would be at 78 to 97 months, if I read the chart correctly.

MR. ERVIN: Yes, sir.

THE COURT: All right. That is so noted. Now, is there anything else you'd like to tell me in his behalf, Mr. Ervin, then I'll hear from him?

MR. ERVIN: Well, Your Honor, I would just like to observe generally that – that he has an extensive criminal history, a relatively extensive criminal history. He also, as the Court well knows, was indicted in this case under an alias.

[6] **THE COURT:** What is your correct name?

DEFENDANT KELLY: Ralph Christopher Neal, sir.

THE COURT: Rife – Ralph Christopher Neal is your correct name?

DEFENDANT KELLY: Yes, sir. It is.

MR. ERVIN: I – I would just argue, Your Honor, that – that he made a step toward rehabilitation when he decided that he no longer wanted to indulge this fiction and brought it to my attention that he was someone else. I, in turn, brought it to the Prosecutor's attention and to the Court's attention and – in a hope that the Court will consider that in sentencing. He's – he's gotten a little older and a little wiser, and I think made a step in the right direction. And – and I believe he's a good person who will never engage in this kind of activity again.

THE COURT: All right, sir. Mr. Kelly, is there anything you'd like to tell me – Mr. Neal?

DEFENDANT KELLY: Yes, sir, Your Honor, there is. I'm sorry for what I've done. As Mr. – Mr. Ervin said, I do want to straighten my life out, and that's the reason I've brought myself forward and – and my true identity, so that I can clear up all the problems that I've caused; all that is possible.

THE COURT: Well, I hope you'll do it, Mr. Neal.

DEFENDANT KELLY: Thank you, Mr. Black.

THE COURT: Anything further from the Government?

MR. ISAACS: No, Your Honor. Except that one thing that [7] the Government make a motion that all of the documents in this case will true name the Defendant as Ralph Christopher Neal.

THE COURT: All right. All the documents then will be amended to show that his true name is Ralph Christopher Neal. Mr. Neal, on the Government's Motion to Depart Downward I'm going to sentence you to 60 months to serve in the custody of the Attorney General, to be followed by a period of supervised release of five years. During that period of supervised release, you will abide by the standard conditions of supervised release. You will have such drug or alcohol after care as the Probation Officer deems appropriate. I will impose a special assessment of $50, but I will not impose a fine because I don't think that there's any likelihood that you can pay a fine. I find that the facts set out in the Pre-Sentence Report are correct, except for those that I have sustained objections to. Thank you, Mr. Ervin.

MR. ERVIN: Thank you, Your Honor.

THE COURT: Good job for your client.

MR. ISAACS: Your Honor, one other matter. The Government presents the agreement – tenders a Motion to Dismiss the remaining counts.

THE COURT: All right. That will be granted. And, for the record, I'm denying the Motion to Continue the sentencing. Mr. Neal is remanded to custody. Marshal, can you see that he is carried under his correct name?

MARSHAL: Yes, I will, sir.

[8] **THE COURT:** And, of course, you have a right to appeal the sentence, Mr. Neal, and if you choose to do so, the Clerk can enter a Notice of Appeal for you.

DEFENDANT KELLY: Yes, sir, Your Honor. Thank you.

THE COURT: Thank you very much. Good luck to you.

MR. ERVIN: Your Honor, just one matter. Mr. Vela just asked me, and I wanted it clear, I want all the records, including the PSI, that the true name of Mr. Neal.

THE COURT: Yes. All right. And now have Kurt Steven Witte. Mr. Habern?

MR. HABERN: Bill Habern for Defendant Witte, Your Honor.

MR. ISAACS: Your Honor, again, Bert Isaacs, representing the United States.

THE COURT: All right. Mr. Habern, have you gone over this Pre-Sentence Report carefully with your client?

MR. HABERN: We have gone over the Pre-Sentence Report together, Your Honor, and have –

THE COURT: And have you told him about all the extensive discussions we have been having about the language in the Pre-Sentence Report concerning alleged "Other Transactions"?

MR. HABERN: That has been discussed with the client in some degree of detail, Your Honor.

THE COURT: All right. Why don't you tell me, for the record, whatever you have to say. And then we'll discuss it on the record.

[9] **MR. HABERN:** All right, Your Honor. We have filed an objection are you speaking of objections to the case, Your Honor?

THE COURT: Yes, sir.

MR. HABERN: All right. We have filed a series of objections to the – to the -- our first objection is based upon the – the first objection I wish to take up with the Court, if I may find my place here, is the fact that we have not had the opportunity to review materials upon which the Level 42 is based. That leaves me in the position, Your Honor, of, quite frankly, not having detailed knowledge of those facts. And we have asked for discovery of those facts. And I would renew, for purposes of the record, my request to be able to review those matters with my client.

Secondly, as to the denial of the two points for relevant conduct. The mention of any additional material contained that – in the, "other material," if I might put it that way, and the Court knows what I'm referring to, that was certainly not part of Mr. Witte's discussion based upon his reliance and our reliance on the Government's information that, "other information," would not appear in the PSI. As a result, he's been denied that two-point decrease. We would ask the Government to join us in the consider – asking the Court to consider granting that two points based upon the fact that he relied, or his detrimental reliance was based upon information given him by the Government. And, secondly, [10] that he relied on our recommendation based upon the assurances of the Government that that would not be a part of – of – of the record. We find ourselves in a situation where the advice given has bitten both of us.

Thirdly, I am somewhat at a loss with regard to Objection 2 on Page 4 of my Objections, as I again have not seen access – I have not had access to information relative to that. The same applies as to the Objection Number Three. I'm sorry, there is no Number Three, so that would be Two that I'm speaking of. I misnumbered. Particularly as to the – the five, I believe, issues that we think are minor issues, but are mentioned in the – in the second objection. Objection Four, "these matters," again, that refer to others persons (Indiscernible) the party, to which I – I fear we still have no information in order to respond. As to Objection Five, I had stated in the Written Objections; we'd like a ruling on that, as we would the others. We – we stand on the objections we filed, and I guess we'll ask the Court for a ruling on those, including

the opportunity to review documents in – in order to advise the client on the basis of these things and see what he would have to say to me against it. Primarily, we are also concerned about the two points. Thirdly, we would like to make argument, of course, about the guideline level that would be appro – that would be proper in this case and what would be an appropriate sentence when that time arrives, Your Honor.

THE COURT: Go right ahead.

[11] **MR. HABERN:** All right. Based upon the amount actually possessed in this case, Your Honor, which was 370 some-odd pounds, Mr. Witte brought to this conspiracy $25,000 to purchase 375 pounds. The amount possessed was, in fact, that amount. As contemplated by the Pre – Plea Agreement, this would be approximately 1126. And when included his two points to a – a voluntary acceptance, which we anticipate should be granted in this case based on information provided to the Court, that would be a Level 24. He also is entitled, we understand, to a 5K recommendation to the Court by the Government in this case. In the Seventh Circuit case of *U.S. versus CEA*, C-E-A, found at Number 91-1492, issued 5 of '92, they – the Court makes mention of Section 2D1.4 where in a situation of an uncompleted transaction, that the amount the defendant did not produce and was not reasonably capable of producing should be the amount upon which the sentence is imposed. In that case, there was a cocaine matter where the client, or the defendant, only brought part of the money into the cocaine or the transaction, though he was sentenced for the full amount. It was an un – it was like this case. It was an uncompleted case. And the Court held that he should

only be sentenced based upon that which he could produce and was reasonably capable of producing. In this case, what Mr. Witte's been able to produce is $25,000 to buy 370 pounds; and our position is that we would hope the Court would impose that sentence upon him, with a two-point reduction and a 5K consideration. This would bring him [12] down to a base level, if the two points were granted, of a Level 24 based on my calculations, Your Honor. I have known Mr. Witte since the period of my involvement in this case after the plea was – was reached, and I – and I said to him for the DeGeurin firm. I attended the debriefing with him where Agent Norman said of him that of the people with whom he was involved, he was the one most impressed – that most impressed Agent Norman as not being typical of the group. I think that speaks true of Mr. Witte. I would like to call the Court's attention to Mr. Witte's family. Would you stand please, ladies and gentlemen? They have come from various parts of the United States to be here this morning. To say this has been a traumatic event for the family is an understatement, as these matters always are. Mr. Witte has opened a business in Colorado in the last couple of years, has married, has a family; and, of course, these things are always difficult for all of those persons concerned. The family is here today in support of Mr. Witte. Mr. Witte understands, based on the meeting this morning, the nature of how things have turned in this case. I am somewhat at a loss to – to express to the Court the deepness of my feelings with regard to what I have found to be a fellow seriously trying to reform his life; who the DEA Agent indicated was the fellow least like the other people in the conspiracy; who has a family; who

has a job; and – and who wants to get this behind him and move on. Now facing what could be at his age a turn in his life that would be a drastic and disastrous situation for him. When, in fact, our [13] detrimental reliance on representations of the Government going in; and our efforts have been less than what we anticipated. I'd ask the Court to consider all of those matters, particularly in light of what – of what we are – what we are facing. With the 5K departure at a Level 24, if the Court would see our argument, we could get out, we would hope, with under 50 months in this case, if the Court could see its way to do that with a 5K. We think with Mr. Witte's willingness to participate in further necessities if the if the Government would call on him to be available is there, and we would hope that based on what the Court is aware of in this case, that a sentence within the 50-month area would be one that the Court would consider.

THE COURT: Let me hear from Mr. Isaacs on the subject of the departure, and then I'll hear from Mr. Witte.

MR. ISAACS: Yes, Your Honor. If the Court will allow me subsequently – the Court – the Government, pursuant to its agreement, intends to recommend to this Court for purposes of this case, the mar – this marijuana case in which Mr. Witte has been charged with and has pled guilty in this Court, is submitting a 5K based upon his agreement to debrief, and he has debriefed. And pur – and this 5K will be submitted to the Court without any recommendation on sentence. This 5K has nothing to do with any other matters pending in this jurisdiction or any other jurisdiction or may be pending in this or any other jurisdiction. It only has to do with

this particular case. And with that stated [14] on the record, Your Honor, we submit that 5K to the Court.

THE COURT: All right. On the Government's representation that Mr. Witte has been fully debriefed in this case; I'll grant the Motion for Downward Departure under 5K1.1. Now, would you like to, after you hand that up –

MR. ISAACS: Yes. Your Honor, I'm looking for the copy of the Order.

THE COURT: I trust that there is no objection to the – from the Defense to this –

MR. HABERN: No objection, Your Honor. May – may I inquire of the Prosecution if they would also consider a comment on the two-point departure for – or two-point downwards?

THE COURT: I expect Mr. Isaacs will do so.

MR. HABERN: Thank you, sir.

THE COURT: Mr. Isaacs is looking for the order that goes with the motion.

MR. ISAACS: Yes, Your Honor. If you – if the Court will indulge – here it is.

THE COURT: All right.

MR. ISAACS: May I continue, Your Honor?

THE COURT: Yes, sir.

MR. ISAACS: With respect to the other matters here, the Government must differ both with Mr. Habern and, also, with the Pre-Sentence Report; and I'd like to

take them in sequence, Your Honor. With respect to Mr. Habern's representa – statement to the [15] Court that he was relying upon representations to the Government, I must remind the Court that number one, the Government has never, ever made any representations in private or on the record to this Court that anything that the Government was recommending or was part of the Plea Agreement would in any way impact on the Pre-Sentence Report's outcome. It was stated specifically that anything that we agreed to we had no control over what the resultant PSR, or the Pre-Sentence Report, would be. We have never stated at any time that Mr. – that the PSR would – or this Court would accept the Plea Agreement. And I believe that the Court when it admonished Mr. Witte at the Plea Sentence stated, on the record, to Mr. Witte that at any time anything that the Government recommends, anything that's in a plea agreement, is a recommendation; that I can accept it or reject it. And if I reject it, you cannot withdraw your plea; and I may sentence you up to the maximum on – under this offense. And I believe the record will reflect that Mr. Witte acknowledged that he understood that. With that said, let me make a clarification as to what the Government did agree with. The Government, with respect to the amount of marijuana involved in this case, the Government agreed on the record that this was a conspiracy involving 1,000 pounds of marijuana. The Government also stated on the record that the only amount of marijuana actually delivered to the defendants was approximately 375 pounds. That was stipulated to on the record both on the record and in private to the Defense Counsel. With [16] respect to the issue of acceptance or responsibility, the

Government also stated that based upon the fact that Mr. Witte was pleading guilty to this offense, it is the Government's belief that he has accepted responsibility for this particular offense. However, the Government never, ever stated, as I stated it earlier, that this would in any way bind the Court or the P – the Pre-Sentence Report rider. And that that was merely a recommendation to the Court that the Court must accept. So Mr. Habern's representation or statement to the Court that he was relying on the fact that the Government committed to making sure that these things wouldn't be taken into consideration by the Court or wouldn't be reflected in the P – in the PSR, I believe is errone – is in fact a misstatement of fact. And it is not something that we had agreed to. And I think he understands that as well. That is the law; that was what we stated on the record. So with that stated, that was the agreement with respect to the amount that was involved. That was also the agreement with respect to the stipulation as to his acceptance of responsibility. With respect to the PSR, Your Honor, it was the Government's position, and this is in particularly with represent – with reference to Paragraph 35 where the offense level is comp – computed based upon an offense which all through this matter the Government has always stated was not part and parcel in any way of this particular offense. And the Government will rely to show to the Court the basis upon which it is talking about is that the cases that are here in this [17] jurisdiction, specifically *United States versus Maraboe*, M-A-R-A-B-O-E, which is 578 Fed.2nd 151, Fifth Circuit case, 1978, and *United States versus Nichols*, which is 741 Fed.2nd 767, Fifth Circuit, 1984. That there are five factors which must be taken into consideration, and those

five factors, in viewing this with the offense which is charged as relevant conduct in this offense, clearly show that these are separate agreements and separate offenses. And I'd like to read them into the record if I may. One factor is the time. These offenses were committed at completely separate times; that the persons acting as co-conspirators are different individuals. With respect to this case, Mr. Witte was in cahoots with Mr. Kelly, or Mr. Ralph Neal, on this particular offense. On this case N – Number 35, he was involved with other individuals. So this is – that goes to that issue with respect that the statute of offenses charged in the indictments are, in fact – there are no two – there aren't any other indictment, but that other offense charges an offense could possibly charge an offense which is completely different than this. And I state just for – as an example on the record that there could be a possibility that that would be an importation count, rather than the offense which he has here. Another thing is that the overt acts charged by the Government or any other description of the offenses charged which indicates the nature and scope of the activity which the Government sought to punish in each case. The overt acts in both of these offenses are in no way connected, in [18] any way connected. They are completely separate. The overt acts that Mr. Witte committed in this particular offense have nothing at all to do in any significant manner with the offenses that could possibly be charged in this offense which is taken into consideration in Paragraph Number 35. And finally, Your Honor, the places where the events alleged as part of the conspiracy took place; they happened at different times and different places with different parties. So it was based upon that

there is the – the issue is is that what is shown in 35 we do not believe is relevant conduct with respect to this particular offense. However, as the Government understands, it has no control over how relevant conduct is interpreted with respect to the PSR. It's just for purposes of making a record at this time, Your Honor, is – the Court is understanding that it is not intended, it has never at any time intended to prosecute or hold Mr. Witte responsible for the conduct in – in Paragraph Number 35 with respect to this particular offense. And that's – that part I differ with the PSR rider. And I think that's about – that's all I have to say, Your Honor. Thank you.

THE COURT: Mr. Witte, I'm curious; do you know what all this is about?

MR. WITTE: Yes, Your Honor, I do.

THE COURT: Do you know that both your lawyer and the Government's lawyer are trying to convince me to disregard all of the talk about anything except this particular little marijuana [19] deal, but for different reasons? Your lawyer wants me to disregard it so that I'll reduce your sentence in this case. The Government's lawyer wants me to disregard it so he can indict you in another case if he wants to. Do you understand that?

MR. WITTE: Yes, Your Honor.

THE COURT: That's kind of unusual. I'm going to remember you because this is the first time that's ever happened in my Court. What would you like to tell me?

MR. HABERN: Your Honor, before he speaks, as the Court is aware, I was not a party to this case until after the plea bargain was cut. Mr. Chris Flood was

involved at that point, and I find myself to a degree to a disadvantage. He has asked if I would ask the Court if he could address one brief matter before the Court.

THE COURT: Of course.

MR. FLOOD: Thank you, Your Honor. Chris Flood, for Mr. Witte also. Just in response to Mr. Isaacs' statements and I think the Court has hit the nail on the head. I think it would be improper to, based on the representations of the Government all along in this case, to consider what's been included as relevant conduct in the Pre-Sentence Report for the following reasons: One, to deprive him of the ability to plead not guilty to that conduct at some further time down the road. That is if in the event Mr. Isaacs does choose to indict him for that unrelated conduct, then he has an opportunity to plead not guilty and go to trial in that [20] case if that becomes necessary. The Court – punishing him for that conduct based on a plea of guilty in this case I think would be improper, especially in light of all the – the representations that it's been not relevant conduct. Now I understand the Probation Department's job in preparing the Pre-Sentence Report, and I understand this Court's job in interpreting what is relevant conduct under the guidelines. But I think that this Court should disregard the so-called relevant conduct in this case for the reasons that I've stated and for the fact that when contemplating the plea – the Plea agreement between Mr. Witte and the Government, he, of course, exchanged his right to a – a trial by jury and came in and pled guilty to this Court with the understanding that it was not relevant conduct. And I think it would affect somewhat the voluntariness of his plea. Now I know it was represented to the Court –

I mean to the Defendant, at the time that the Court is not bound by the Plea Agreement. I am fully aware of that. However, the discussions were at the time that the conspiracy was for a thousand pounds, that the actual amount possessed was 375 pounds, and that the guideline range would be based upon those amounts, and that if he wanted to cooperate with the Government so that the guide – the statutory minimum did not bar this Court from going below five years, then he can come in and cooperate with the Government, which he has done; and as Mr. Habern pointed out, which he has done successfully. I don't think that the Court should anticipate a charge by the Government further down [21] the road, and either one, try to help Mr. Witte by taking it into consideration and going up from the contemplated sentence before the Pre-Sentence Report was prepared. But if the Court feels bound to take the relevant conduct into consideration, then why don't we allow that to be a future fight on a plea involved down the road. And as Mr. Habern pointed – is pointing out to me now, the relevant conduct burden of proof at sentencing is by a preponderance of the evidence, whereas at trial it'd be beyond a reasonable doubt. And so what you're basically also doing is making a lesser burden of proof on the part of the Government. If you're going to sentence him for that relevant, so-called relevant, conduct that's now come up late in the game. But my only concern was, Your Honor, and I think the reason why they've called me to be here, is that he has pled guilty to this case. And all along it's been maintained that these are the facts in this case. And while the Probation Department, I'm sure, does an excellent job preparing the Pre-Sentence Report; and

while this Court may even consider that conduct in the succinct sentence, I think in order to insure the voluntariness of the plea the Court should consider along the contemplated range of conduct in light of the 5K departure. I think this Court's able to do so. If the Court doesn't have any further questions of me, I'll sit down.

THE COURT: No.

MR. HABERN: Thank you, Your Honor.

MR. FLOOD: Thank you, Your Honor.

[22] **THE COURT:** Anything further?

MR. ISAACS: Nothing from the United States, Your Honor.

MR. HABERN: Mr. Witte might like to address the Court, Your Honor; I'm sorry.

THE COURT: All right. That's fine.

DEFENDANT WITTE: It's – I'm duly sorry for – for – for any crimes that I have committed here and for the grief I've caused myself and my family. And – I'm – I'm here today to accept what penalty that the Court deems necessary for me. Now it was my understanding through – through conversations with my attorney at the time, Chris Flood, and Mr. Isaacs here, that in exchange for my cooperation with Agent Norman that I would have immunity from prosecution from any other cases.

MR. ISAACS: No. Your Honor, that was – I –

MR. FLOOD: That's not included in the plea papers, Your Honor. And whether that was a miscommunication on my part or a misunderstanding on Mr.

Witte's part, that – that shouldn't even be considered. That – that's the – that's further down the road; and I think, as you've stated, if the Government attempts to prosecute him for another unrelated offense, then that's a – that's a different fight altogether, and it's not for this Court even to anticipate what the results would be in that case. I don't want the Court to attempt to assist the Defendant in saying, "Look, I'm going to go ahead and take the related conduct into consideration."

[23] **THE COURT:** I'm not here to help the Defendant.

MR. FLOOD: Yeah. I know – I know that, Your Honor. I'm not – I'm not implying that. What I'm implying is that I don't want this Court to try to anticipate what may happen in the future. And – and that –

THE COURT: I learned a long time ago, Mr. Flood, not to try and to do that.

MR. FLOOD: Thank you, Your Honor.

MR. HABERN: Your Honor, if I may – if I may have one more minute of the Court's time? The family has come from various parts of the country to be here. This Court's going to impose a prison sentence, and we're aware of that. Mr. Witte has been on bond; he's been a cooperating witness. He is still trying to assist in – in one certain way which has not come to fruitation (sic) yet, but he continues to. We would ask the Court to consider allowing Mr. Witte a voluntary surrender. And if the Court could not allow that to occur, that he be allowed to turn himself in Monday while he could visit with his

family over the weekend in Houston subject to any conditions the Court would want to impose. And, finally, if the Court could see itself clear to request a recommendation, and we clearly understand it's a recommendation, to a prison facility operated by the Bureau of Prisons somewhere near his home in the Colorado area. The Court – we would very much appreciate the Court's consideration.

THE COURT: Anything further?

[24] **MR. ISAACS:** Your Honor, just with that last factor. I don't believe under 3018, United States Code 3143, if Mr. Witte is sentenced to a prison term that the Court must sentence him – must put him in the custody of the Marshals. I just merely cite Section 3143B; and, basically it says that if he has been found guilty and sentenced to a prison term then he should go into – he should be put into the custody of the Bureau of Prisons, custody of the Marshals and bond revoked at this point in time, unless that by some evidence that there's some showing that his conviction will be overturned, and some other matters which –

THE COURT: Extraordinary circumstances?

MR. ISAACS: Yes, sir.

MR. HABERN: We would urge the Court that we – we're certainly aware of the law. We really would urge the Court to consider the family circumstances of their being here; or maybe ask the Court to defer entering an order until Monday morning if that would not be impossible, so that he could have at least the weekend with his family.

THE COURT: All right. Counsel, as you all well know, I have given this matter a great deal of thought; spent a lot of time with the Probation Officer. The Probation Officer did an outstanding job in this case of analyzing all of the facts which came to her attention, and that is what the Sentencing Reform Act requires. When Congress passed that statute, they mandated that the Probation Officer be independent of counsel, independent of the [25] Government, and in – in fact, independent of the Court in preparing these Pre-Sentence Reports. And our Probation Officer has made me very proud of the job that they do. While both sides have their own reasons for wanting to disregard the facts that the Probation Officer has included in this Pre-Sentence Report, the facts exist; and I find that they are true by a preponderance of the evidence. I cannot disregard them. I don't think Counsel and Defendant, Mr. Witte, has shown any grounds for withdrawing the guilty plea; and I deny that Motion to Withdraw. I do grant the objection to the failure to give acceptance of responsibility. I will give him credit for acceptance of responsibility. That still puts him at a Level 40, with a range of 292 to 365 months. Incognizant of all of the facts of this case, and I adopt the remainder of the Pre-Sentence Report as accurate, and also being cognizant of Rule 35, I'm sentencing Mr. Witte as follows: He is to serve 144 months in the custody of the Attorney General to be followed by a period of supervised release of five years. During the period of supervised release, he's to abide by the Standard Conditions of Supervision adopted by this Court and take part in any drug after-care program that the Probation Officer deems appropriate. I'm not going to impose a fine in this case because I think his

family needs his assets more than the Government does. I am going to impose a special assessment of $50.

This relevant conduct that the Probation Officer spells out in this report is, in my opinion, relevant conduct related to the [26] charge to which he pleaded guilty. The other objections, if any, are overruled.

As to voluntary surrender, I believe the fact that Mr. Witte has cooperated with the Government so well and has shown a good attitude toward assisting the Government in this rather complicated case, I find that there are extraordinary circumstances. I will permit him to remain on bond until notified when to appear at an institution. I will not, however, make a recommendation as to the location, since the Bureau of Prisons seriously endeavors to put people near their homes; and they have simply been ignoring my recommendations anyway because the institutions are so crowded. Of course, Mr. Witte has a right to appeal the sentence, and if he requests the Clerk can enter a Notice of Appeal in his behalf. The form he is signing is his solemn assurance that he will appear when ordered to do so; and, Mr. Habern and Mr. Flood, you will explain to him what happens if he doesn't. Government has now moved to dismiss a count to which he has not pleaded guilty which is Count One, and I am signing that Order. Thank you, Counsel. Good luck to you, Mr. Witte.

DEFENDANT WITTE: Thank you.

MR. HABERN: Thank you, Your Honor.

THE COURT: We stand in recess.

MR. ERVIN: Your Honor, may I go back on the record in Mr. Kelly's case for just a – just a moment?

THE COURT: Sure. This is Mr. Ervin.

[27] **MR. ERVIN:** Yes, sir. Don Ervin, for Defendant Kelly. Your Honor, I simply forgot to do something, and I apologize to the Court. I wanted to ask the Court to give on a Judgment Sentence Mr. Kelly credit for serving time that he was incarcerated and also time for – a credit for time that he spent in a halfway house. May I go through that with the Court?

THE COURT: I don't think it's going to do any good, Mr. Ervin. The Bureau of Prisons reserves the right to calculate good time, and I don't think my recommendation will make any difference.

MR. ERVIN: Well, I'm primarily addressing the issue, Your Honor, of giving credit for time spent in halfway houses on his sentence. In other words, he will get as a matter of law, as I understand it, credit for time that he's actually spent in jail, but the issue –

THE COURT: Or in custody, even if he were on bond, as I understand it. Isn't that – no, that wouldn't apply.

MR. ISAACS: He will – Your Honor, my understanding is that as long as he is in Federal custody on this particular charge, I believe they already calculate that. But I'm not sure – I believe he is – he is given credit for time served for all time he is in Federal custody for this particular charge. That is what I understand the law to be. Or – and that's the policy I believe the Bureau of Prisons –

THE COURT: And the Circuit Court has recently made it very clear that only the Executive Branch in the person of the [28] Bureau of Prisons can make that calculation.

MR. ERVIN: But I –

THE COURT: I – when I sentence I give credit for all that I'm legally entitled to give him credit for. They calculate whether he has served that sentence. If you'd like to make that on the record, state the dates. You're welcome to do so, so that that'll be part of the record.

MR. ERVIN: Yes, sir. I would like to do that.

THE COURT: All right.

MR. ERVIN: And I'd ask the Court to give the Defendant credit for eight days in the Harris County Jail from February the 8th until February the 15th, 1991.

THE COURT: That was while he was under arrest on these charges?

MR. ERVIN: That's correct, Your Honor.

THE COURT: All right. I'm sure he will get credit for that.

MR. ERVIN: Yes, sir. Also for seven days from February the 16th to February the 22nd, 1991, while he was in New Directions here.

THE COURT: Seven days?

MR. ERVIN: Yes, sir. There's – it goes on here.

MR. ISAACS: Your Honor, I'm not quite sure whether – I believe it's while he's incarcerated; and I

don't know if incarceration would include as a condition of release that he be at [29] a halfway house.

THE COURT: Well I could certainly be willing to add my recommendation for whatever it's worth as to any time he's spent in any of our jail facilities, but not for any time that he's spent in a halfway house.

MR. ERVIN: I understand, Your Honor.

THE COURT: All right.

MR. ERVIN: The – if I may very quickly, just –

THE COURT: Sure. Go ahead.

MR. ERVIN: Also –

THE COURT: Well, just tell me the dates for the record when he was in a halfway house.

MR. ERVIN: Yes, sir. Also I would ask for 180 days of home confinement from February the 23rd to August the 21st, 1991. Seventy-nine days from August the 22nd to November the 8th, 1991, in New Beginnings Treatment Center in Tucson, Arizona. One-hundred and five days from November the 8th to February the 21st, 1992, in New Directions, also here in Houston. And then 92 days – no, it's actually 151 days from May the 22nd, 1992, to July the 10th, 1992, spent in the Montgomery County Jail on this case.

THE COURT: All right. I will not make any recommendation to the Bureau of Prisons with regard to any of those dates. I'm going to let them make the calculations. So that's refused.

MR. ERVIN: Yes, sir.

MR. ISAACS: Your Honor, –

[30] **THE COURT:** Yes.

MR. ISAACS: I'm sorry. He's – this has to do with Mr. Witte. I just make sure that the record is complete that the Court has released Mr. Witte with –

THE COURT: On his bond.

MR. ISAACS: – on his bond; however, as the Court is aware, there must be a recommendation by the Government; and just to make sure that the Court is – we're clear on the record, the Government is not making such a recommendation. This is being done by the Court, and under 3143, so that the Court is aware, it says you have to refer back to A2, and under it, it says that the Judicial Officer may release him on bond if: one, the Judicial Officer finds a substantial likelihood that a Motion for Acquittal or New Trial will be granted, or in the disjunctive if the Attorney for the Government has recommended that no sentence of imprisonment will be imposed and the Judicial Officer finds by clear and convincing evidence that the person is not likely to flee, et cetera.

THE COURT: All right. Why don't you file a Motion to Revoke then, and I'll reconsider.

MR. ISAACS: Thank you, Your Honor.

THE COURT: All right. We'll stand in recess.

(Adjourned 10:56 a.m.)

(Service Omitted In Printing)

UNITED STATES DISTRICT COURT

SOUTHERN District of TEXAS

UNITED STATES OF AMERICA

V.

KURT STEVEN WITTIE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: H-91-00033-01

William Habern
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 2 on February 21, 1992 .

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1), (b)(1)(B), 846 and 18:2	Aiding and abetting in attempt to possess with intent to distribute marijuana.	02-08-91	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[X] Count(s) 1 (is) (~~are~~) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50 , for count(s) 2 , which shall be due [X] immediately [ ] as follows: CLERK, UNITED STATES DISTRICT COURT, ATTENTION: Finance, P.O. Box 61010, Houston, Texas 77208. IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 391-44-3641

Defendant's Date of Birth: October 29, 1952

Defendant's Mailing Address:

Rural Box 1367
Lyons, Colorado 80540

Defendant's Residence Address:

Rural Box 1367
Lyons, Colorado 80540

July 10, 1992
Date of Imposition of Sentence
/s/ Norman W. Black
Signature of Judicial Officer
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer
July 14, 1992
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FORTY-FOUR (144) MONTHS as to Count 2 .

[X] The court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a facility near his relatives in Colorado.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

a.m.
[ ] at _____ p.m. on _____ .
[ ] as notified by the United States marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[X] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS as to Count 2.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment

imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a program, inpatient or outpatient, for treatment of drug and/or alcohol addiction, dependency or abuse, which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the probation officer and shall comply with all rules and regulations of the treatment agency until discharged by the program director with the approval of the probation officer. The defendant shall further submit to such drug-detection techniques, in addition to those performed by the treatment agency, as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): the Court granted the

defendant a two-level reduction for acceptance of responsibility.

Guideline Range Determined by the Court:

Total Offense Level: 40

Criminal History Category: I

Imprisonment Range: 292 to 365 months

Supervised Release Range: 4 to 5 years

Fine Range: $25,000 to $2,000,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[X] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

APPROVED AS TO FORM: RMB

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	CRIMINAL NO. H-92-0207
v.	§	
	§	
STEVEN KURT WITTIE	§	
TOM POKORNY	§	

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about August 18, 1989 through August 15, 1990, in the Southern District of Texas, and elsewhere, and within the jurisdiction of this Court,

STEVEN KURT WITTIE
TOM POKORNY

defendants herein, and others known and unknown to the Grand Jury, did knowingly, intentionally and unlawfully agree, conspire and confederate to commit an offense defined in Title 21, United States Code, Section 952(a), that is, to import into the United States from a place outside the United States, in excess of five (5) kilograms of a substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 952(a); 960(b)(2)(B) and 963.

COUNT TWO

On or about August 18, 1989 through August 15, 1990 in the Southern District of Texas and elsewhere, and within the jurisdiction of this Court,

STEVEN KURT WITTIE
TOM POKORNY

defendants herein, and others known and unknown to the Grand Jury, each aiding and abetting the other, did knowingly, intentionally and unlawfully attempt to import into the United States from a place outside the United States, in excess of five (5) kilograms of a substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 952(a); 960(b)(2)(B) and Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ Illegible
FOREPERSON OF THE
GRAND JURY

RONALD G. WOODS
United States Attorney

By: /s/ Bertram A. Isaacs
BERTRAM A. ISAACS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted In Printing)

(Filed Feb. 25, 1993)

PRETRIAL CONFERENCE
BEFORE THE HONORABLE KENNETH HOYT

* * *

[3] PROCEEDINGS

February 22, 1993

THE COURT: Good morning. This is cause number 92-207, the United States of America versus Kurt Wittie – Steven Kurt Wittie, I believe.

MR. ISAACS: It's Kurt Steven Wittie. "Wittie," your Honor.

THE COURT: I'm sorry. W-i-t-t-e or is it W-i-t-t-i, which is it?

MR. GERGER: It's W-i-t-t-e.

THE COURT: All right. And it's spelled differently on the presentence report, and I'll get it all right in a minute. So, I apologize.

Gentlemen, let me ask you, I believe we're here for a conference, but also to deal with the question of the double jeopardy plea, double jeopardy based on the plea of guilty that Mr. Witte entered apparently back in 1992, is it, or 1991, I'm sorry. He was sentenced, I believe, in '92

in Judge Black's court on an aiding and abetting pursuant to a plea agreement.

Let me ask, I don't believe you filed a written response, have you, Mr. Isaacs?

MR. ISAACS: Yes, your Honor, we did.

THE COURT: Have you?

MR. ISAACS: We filed a written response and –

[4] THE COURT: Well, let's see what I've got here.

I do have it. I'm sorry. I was looking at the transcript. The transcript as a part of I believe it may have been filed on motion hearing that was filed back in July of '91.

MR. ISAACS: That's correct, your Honor. There's also a transcript of a July 12th hearing which was a pretrial hearing in that other matter, which we gave a copy of that to the Court as well because it's referenced in the government's memo. We also gave a copy of that transcript to Mr. Gerger. The importance of that, it also goes mainly to the issue of whether or not these were separate and completely distinct crimes.

If I may, your Honor, could I – I could help perhaps by giving some history of how this case came about?

THE COURT: Go ahead.

MR. ISAACS: Basically, your Honor, sometime in 1990, Mr. Witte and another individual by the name of Tom Pokorny, who is also a defendant in this case, and a Dennis Mason were in contact with undercover agents

from the DEA concerning their intent to import into the United States controlled substances, specifically marijuana and cocaine. They had contact with these undercover agents. The undercover agents were posing as persons who could smuggle things across the border onboard their aircraft.

[5] They were hired by Mr. Witte, Mr. Pokorny and Mr. Mason. And, in fact, so – I want to say several hundred thousand dollars, but at least $100,000 or more in cash was tendered to the agents during the course of this conspiracy to get the controlled substance across the border. Mr. Witte participated in also the conversations and negotiations which we had captured on video tape. In fact, there are three video tapes that are involved here. There was also some property, a trailer, transport vehicles, which were supplied by the conspirators, a horse trailer specifically which was given by Mr. Witte for purposes of conspiring and importing this cocaine – I mean, marijuana into the United States.

They had not taken any substantial steps, but had, in fact, on a specific day told the agents where they were supposed to pick it up. Mr. Witte was going to be waiting on the United States side of the border when the agents brought it across. It was Dennis Mason who was going to be in Mexico. Tom Pokorny's whereabouts at that time were not known where he was supposed to be. The agents in cooperation with the Federales, the police in the Republic of Mexico, made contact with the conspirators on a landing strip in Mexico. They seized some close to 600 kilos of cocaine. They captured Dennis Mason, who is serving time now in Mexican prison on that offense. They did not know where Mr. Pokorny was,

and at that point in time they did not know where Mr. Witte was.

[6] Subsequently, I guess within a matter of days or a day or so, Mr. Witte made contact with the agents. He still didn't know that they were law enforcement officers, still didn't suspect that they were undercover agents. Mr. Witte was aware of the fact that Mr. Mason had been captured. Didn't know where Pokorny was, wanted to cool things off, and he went off on to places where he – unknown to the agents at that time. The officers didn't arrest him at that time because they wanted Mr. Pokorny as well.

Some months later in 19 – I believe it was 1991, in January, some several months later seven or eight months later, there was contact made between Mr. Witte and one of the subsequent undercover agents. The – this time Mr. Witte and it's not clear because of different versions of whether it was Mr. Witte that contacted the agents or the agents contacted Mr. Witte, but the result of it was is that Mr. Witte wanted to purchase marijuana from these undercover agents, and that he had another deal going that he wanted to purchase from them, and there's telephone conversations involving that. Now, this is the offense to which he pled guilty for.

The agents agreed with Mr. Witte. He transferred more funds, asked to use the trailer that he had used before, and supplied another trailer and this time he had a new co-conspirator, an individual by the name of – who we originally knew him as Sam Kelly. His real name is Ralph [7] Christopher Smith – Ralph Christopher – I can't

remember the last name. We didn't find that out until after the plea.

During some pretrial hearings, the government – that's what that July 12th hearing is all about. During the course of that, Mr. Witte's then counsel Chris Flood kept asking the government whether or not they were going to be using anything from any other conspiracy. We said this is the marijuana conspiracy which he was involved in in Judge Black's court is the only count that we're dealing with at this time.

They asked for discovery concerning what they believed to be the – because they were aware of – and they put it in kind of cryptic terms, was there some other offense that was involved. Mainly speaking to this cocaine conspiracy offense. They brought it up. The government did not.

The government emphatically unequivocally and with no equivocation at all stated that that cocaine conspiracy had nothing at all to do with the marijuana offense.

THE COURT: Wasn't it a part of the responsibility of this man when he was going through debriefing to tell everything that he knew, and isn't that how you learned it? I mean, he told you in the process – I'm not saying "you' – but he told you in the process of being debriefed to see if he could get his conspiracy count dropped so he could plead to the aiding and abetting, when it occurred?

MR. ISAACS: No. No, that was not true, your Honor. [8] He never ever admitted to any, to anything,

and if the Court would look at that January 12 hearing, he never, ever admitted.

THE COURT: Then why then, and here is my concern, why then and how did the probation office get this information unless they got it from him or from DEA, some of these same people who were investigating him simultaneously, let's say, for both of these offenses?

MR. ISAACS: I think, your Honor, if the Court would read that January 12 – July 12 transcript, you'll see that it was the defense counsel who kept bringing this issue up. It became an issue because of defense counsel. They kept talking about it during the pleadings. They kept, they went from varied things from it being discovery as part of the same conspiracy to going to the point where it was Brady evidence.

Judge Black denied them on all-counts basically stating that at that point in time, if you look at that July 12 hearing that this was not part of the same offense. And that the government could not, would not be using it because we stated we wouldn't be using it for any purposes. We never –

THE COURT: When did he enter his plea and when was he sentenced? He entered his plea, I thought – let's see.

MR. ISAACS: He entered his plea in 1991. I don't have a copy of the record with me, your Honor.

THE COURT: All right. I'm looking at the plea here. It seems to me that he entered his plea in March of '92. He [9] entered a plea of guilty to Count Two and to cooperate with the government by providing truthful

information concerning this and all other offenses about which he might be questioned by law enforcement agents as well as the grand jury if required. In exchange the government agreed to dismiss Count One, which is the marijuana, which is the conspiracy count and to file a 5 K 1.1 motion for downward departure at sentencing, if Kelly's cooperation resulted in substantial assistance. Did that happen?

MR. GERGER: Mr. Witte –

THE COURT: I'm sorry. Maybe I'm looking at the wrong – this is regarding Kelly, is that right?

MR. ISAACS: Yes.

THE COURT: Mr. Witte, let's see.

Witte appeared for sentencing on February 21st of '92, appeared for rearraignment and entered a plea of guilty to Count Two of the indictment, agreed to cooperate with the government, agreed to testify if required. 5 K 1 departure downward, if he cooperated, if cooperation is deemed as substantial. So, that's the same deal as Kelly got except you're saying that Kelly had a deal to give all the information about any offense that he had, and Witte didn't have that deal.

MR. ISAACS: Well, no, your Honor, I think the Court has confused the issues of his debriefing and testifying.

One of the things is that Mr. Kelly ends up [10] pleading guilty to that marijuana case because Mr. Witte pled guilty. That is primarily the reason why Mr. Witte got any consideration in the first place when we were going to move this case. But the fact that he debriefed,

none of that information is being used for purposes of prosecuting the case before this Court.

THE COURT: How do I know that?

MR. ISAACS: Your Honor, because it's stated in the record. All of the evidence, it is stated in the record with respect to the video tapes, which are going to be involved. We had a hearing on it. That was the July 12 hearing. We never had to turn them over.

Defense counsel has made a statement in his response to the government's response that Judge Black looked at those video tapes. He never saw the video tapes. No one has ever seen them until this case right now. They asked it to be turned over. We refused –

THE COURT: When were these video tapes made?

MR. ISAACS: These video tapes were made during the course of the cocaine importation conspiracy which is before this Court.

THE COURT: I know, but do you have any idea what those dates are?

MR. ISAACS: Yes, your Honor, they were in 1990, well before this marijuana conspiracy to possess with intent to [11] distribute marijuana ever came about.

THE COURT: Was this the case out of which the other co-conspirator, alleged co-conspirator, was convicted in Mexico, was that when the video tape was made?

MR. ISAACS: Mr. Mason, with respect to the importation case? Yes.

THE COURT: So, what you're saying in 1990, there was an operation going, video tapes were made, and those video tapes would show, I suppose, activity involving Witte and Mason –

MR. ISAACS: Unequivocally. They are like a Woody Allen film where he sits there telling us about what he wants to do. They are black and white and clear.

THE COURT: Well, here is my concern. Why would you – and not necessarily you – but why in the world would the government not want to go ahead and pick that man up and prosecute him in 1990, and wait and then get this little reverse sting operation marijuana charge in 1991, and then as a part of the sentencing include that as relevant conduct and punish him outside of the range of punishment that they could even punish him for on the marijuana charge?

MR. ISAACS: Your Honor, may I – there are two things that the Court is not aware of. Number one, one of the reasons being is that this was a very extensive investigation, and Mr. Pokorny was the person we wanted to have and we were still [12] investigating. The agents did not want to let anybody know who they were.

Secondly, with respect to what the Court concluded as the government wanting this evidence to be used for purposes of Mr. Witte's sentence, that is, the Court has not looked at the pretrial – the sentencing transcript. In that transcript both the government and the defense counsel argue to the Court that this was not part of the marijuana offense. Both the government and the –

THE COURT: But that's not what probation came up with. So, you end up with an offense level and a computation that's totally outside, and consideration has been taken. I think that what – what was the sentence that Mr. Witte received out of that trial?

MR. ISAACS: He got 144 months, your Honor.

THE COURT: Which is still in excess of what he would have received under the marijuana charge.

MR. ISAACS: No, your Honor.

THE COURT: That's a level – what, I mean, with a 5 K 1 departure, that's what brought to it the 144.

MR. ISAACS: Your Honor, under the guidelines the range of punishment for that marijuana case was 5 to 40, and as the Court is fully aware that the Court could depart anywhere it wanted to as long as it gave –

THE COURT: Mr. Isaacs, here is what I'm saying, if it [13] was 5 to 40, the question is what would the scoring have been under those circumstances? And in my opinion, the scoring on – well, let's just look it up. On the scoring on – what would have been the –

MR. GERGER: 371 pounds, and I believe it was about a five year sentence, but the government was recommending a downward departure from that. So, it would have been less than five years.

THE COURT: Well, but five years is 60 months.

MR. GERGER: Correct, 60 months, it would have been less than that.

THE COURT: He received 100 and what?

MR. ISAACS: Your Honor, let me see, if I understand. If the Court is arguing whether or not –

THE COURT: I'm trying to understand the facts.

MR. ISAACS: The fact is is that the government and defense counsel argued and objected to the presentence report stating that the use of that cocaine case as relevant conduct was objectionable, and we both did it on the record.

THE COURT: All right. Then what would the score have been for whatever – how many pounds of marijuana?

MR. ISAACS: It was a one thousand pound conspiracy. He pled to Count Two for the substantive count, and all the government had placed inside which we stipulated the fact we only put 375 pounds inside.

[14] THE COURT: What would that have been?

MR. ISAACS: It would have been –

THE COURT: What would that have made his score be at that point, on 375 pounds?

MR. ISAACS: Your Honor, on 375 pounds, I'll just look in my guidelines here. I believe it would be probably come out to a level 26, which would have been –

THE COURT: About 80 something months, probably. It would have been between 60 and 78 months, probably.

MR. ISAACS: Your Honor, as it's been stated here that it would have been a level 26.

THE COURT: Right, which is 63 to 78 months on a – if it's a criminal history category of one and 70 to 87 months or criminal history category two, which says to me that your downward departure should have been from that number if there was going to be a 5 K departure. It should not have been from some other number.

MR. ISAACS: Well, your Honor, I agree with you. That was what the government was complaining about at the time. We stated when we gave the 5 K, that the 5 K was only for this, that marijuana case. We stated that on the record.

THE COURT: I guess what I'm saying is, what I'm saying is it's not, it's not that – well, how can you downward depart from a sentence that the man shouldn't have received in the first place?

[15] MR. ISAACS: Well, your Honor, I'm not saying – I'm not – you're preaching to the choir here.

THE COURT: No, here is what I'm saying, if he was entitled to a 5 K departure, downward departure and when he received this benefit, he still got twice as much time as he would have gotten had he not had the deal that you made, you know, in terms of 5 K 1 departure –

MR. ISAACS: I understand.

THE COURT: – then the question is: Where in the world within the sentence is any authority for the judge to have given him an upward departure of twice the amount of time?

There's no way he could have done that unless he considered the relevant conduct which speaks volumes about how in the world we're sentencing these folk

with this relevant conduct showing. I mean, there's no way in the world that anybody could see this except in my opinion as seeing it as the judge looked at the scoring that was in the book based upon cocaine and other deals that were made and said, "Okay. This is a 40. What do you want to do?" And you said, "A 5 K 1 departure. Judge, I want you – he's cooperated. He's done all this stuff, and we want to tell you, Judge, that he is – we shouldn't consider the fact that he may have been doing a cocaine deal because we may even have an investigation going on in that regard." And the judge says, "Okay. That's fine. So, I'll downward depart ten points or two points," maybe he didn't [16] depart at all. 40 won't get you much more than what he got. 40 gets you 292 months. He got 180 something?

MR. ISAACS: 144.

THE COURT: 144, which means that he was sentenced at a level 32 which is an eight point reduction, essentially. I'm not sure that – see, I think that at least one of the things that the defendant says is right. He is suffering under a void or a voidable judgment.

MR. ISAACS: Your Honor, he could have appealed that, he didn't. He tried –

THE COURT: He doesn't have to appeal a void judgment. He can do it right now on some kind of writ or he can come in here and say, "Judge, I've already been sentenced to too much time. Don't sentence me to any more."

MR. ISAACS: Well, your Honor, I think that the guidelines speak to that issue already. 5 (g) 1.3 talks

about this very similar issue, but what the government loses is the ability to have these cases served consecutive. They must be served concurrently. Ordinarily, such an – if you look at 5 (g) 1.3, which is in the purple book before the Court, it speaks exactly to the type of issue we're dealing with here. We're dealing with a situation where a Court takes into consideration for purposes of punishment uncharged conduct, and then –

THE COURT: That's right. That's inappropriate.

[17] MR. ISAACS: Then 5 (g) 1.3 approves of it.

THE COURT: Well, it may approve it, but the point is that this man, the sentence that this man received is in violation of federal law. That's all it means. It's in violation of federal law.

MR. ISAACS: Your Honor, let me ask you this question –

THE COURT: I mean, we get reversed all the time for departing two or three points because we don't tell the Court why we're doing it, and there's no explanation for a man getting 144 months on a case when he would have received 65 or 70 months and would have received in my opinion probably 25 to 30 or 40 months on a 5 K 1 departure.

MR. ISAACS: Your Honor, the whole point – first of all, the whole premise, number one, of the 5 K was that it went to the issue of the marijuana case and solely that alone. There was never any discussion, in fact, emphatically, there was always a discussion that there was an ongoing investigation with respect to the cocaine, and there was never any part of the plea agreement that the

government would be dismissing or not charging Mr. Witte with that importation case. In fact, we –

THE COURT: I don't disagree that those probably are not the facts. That's not what I'm arguing about. I'm talking about the effect of what we're doing here. If he were found [18] guilty of these counts, I suppose, he'd get life. I don't know what he'd get. Probably somewhere in the range of two or 300 months, which says to me, that, you know, that it doesn't make sense to plea bargain with him on the marijuana to simply come around next week and charge him with a cocaine case.

MR. ISAACS: But he always was aware of that fact. That was always –

THE COURT: I'm not suggesting that he wasn't aware that that possibility didn't exist. I'm talking about the use of government money.

MR. ISAACS: Well, your Honor, let me also say this with respect to the issue of how much time he was going to get under this, under this guideline. 5 to 40 is the offense level. As this Court is aware that the Court regardless of any recommendations by the government or any opposition by the defense as long as it states on the record "may use uncharged conduct for purposes of going anywhere within that 5 to 40 range and may depart upward." He can appeal that issue. He never did. The issue was he could have appealed the upward departure, which is exactly what we're dealing with here. He never did it. He did not do it because he figured at this point in time that, hey, I don't know.

THE COURT: Maybe he figured on this day?

MR. ISAACS: Exactly.

THE COURT: On this very day.

[19] MR. ISAACS: And he cannot manipulate the system that way.

THE COURT: I think it's your function as a United States attorney to say, "Judge, you're wrong."

MR. ISAACS: We did.

THE COURT: "This is not where you ought to be. You ought to be at level 60," and you should have whispered in the Judge's ear –

MR. ISAACS: We said it on the record.

THE COURT: – "We've got another case out there."

MR. ISAACS: We did. I'm trying to say, your Honor, if you look at the record, we did. We told the Court that on several occasions, at sentencing, at pretrial hearings. We told him. We told the pretrial services people. We did it on all occasions. At sentencing we protested. It is very curious, if you look at the record, Judge Black –

THE COURT: I have read the record.

MR. ISAACS: Judge Black says on the record, he states – he addresses Mr. Witte, he says, "Mr. Witte, you know, you're in a very, very – do you know what's going on here? Your counsel and the government are objecting to this enhancement," and he says, "but for different reasons. The government wants to prosecute you on the other case. And defense counsel doesn't think

it's appropriate because he wants to get down to the lower." And the government, I mean, the [20] Court just completely ignored both counsel. Now, I'll show you –

THE COURT: But I cannot ignore this situation. I mean, just because Judge Black ignored it, doesn't mean I should ignore it. I have to do something about this because the problem is in my own heart, I know the man is being – has been done a bad deed by having him sentenced to something – by having some bargain that he never had with you. He had no deal with you at all the way he got sentenced. That didn't mean anything to him. He went in and bled his heart out, whether he told the truth or not. He went in and told you everything he knew. He's getting prosecuted for another offense, and he hasn't gained anything at all.

I guess you could say he gained the fact that Count One of the indictment was dismissed, but that wouldn't have made any difference under these circumstances. He should have just pled guilty.

MR. ISAACS: The government is precluded from acts, and the Court is precluded from imposing consecutive sentences. The Court cannot do that under the guidelines now.

THE COURT: I know, but if all you want is another 50 months or 60 months, why didn't you just get it out of him in the first place? Try him on that case. Let Judge Black give him 250 months, and we wouldn't be having two trials where that case took up a bunch of Judge Black's time and now I've got to [21] try the case. I mean, Judge Black got off clean. He just took a plea and it's an easy walk for him, but I'm going to have to try a

case that may take two or three weeks. I feel like I'm getting screwed in this process.

MR. ISAACS: Your Honor, we have two defendants. Regardless of what happens to Mr. Witte, I still have to prosecute Mr. Pokorny on this very same case.

THE COURT: I'm not suggesting you didn't, but I'm just talking about the efficiency and the use of your time, the use of government money, and the use of my time. That's the thing that bothers me, and the fact that the man is already serving 12 years, about 12 years already. I mean, what's – what can we give him, another ten?

MR. ISAACS: Your Honor –

THE COURT: How old are you, Mr. Witte?

THE DEFENDANT: 40, your Honor.

THE COURT: 40?

THE DEFENDANT: Yes, sir.

MR. ISAACS: Your Honor, had the government been aware that the Court was going to take this tack, there would have been – there would have been some consideration here with respect to the plea agreement. It was always understood by all parties concerned, defense, the Court and the government, that this case pending before this Court was not a part of that marijuana case. It is –

[22] THE COURT: I don't disagree that what you've done in terms of sentence – in terms of stating their offenses does not, and I don't know that counsel is

disagreeing with that, but they don't state clearly different separate offenses that which is one element, one aspect of jeopardy, a way that jeopardy attaches.

I'm not sure that he's not saying that you cannot prosecute him for conspiracy in a cocaine deal. I think more probably, and I think you may be making multiple arguments, but I think probably the strongest argument, if any, he has is a question of how much information did he give to you, if any, that resulted in this prosecution, number one; number two, what are the dates in terms of the time frames and how do you then carve out of that some special time that you want to prosecute him on another offense that is incorporated maybe to some extent or maybe not to the marijuana charge? He's already pled guilty. And then finally, whether or not the time that he's been sentenced to more than covers a period of time that he would have received had he pled guilty. Had he pled guilty to cocaine on that day, he wouldn't have gotten much more, if any, than what he's gotten now.

MR. ISAACS: Yes, he would have.

THE COURT: Aiding abetting cocaine and a 5 K 1 departure?

MR. ISAACS: He wouldn't have gotten a 5 K 1.1 [23] departure had we been dealing with this case.

THE COURT: That's what you're telling me today.

MR. ISAACS: Your Honor, we're in court right now. We could have at any point in time if that was the issue, if we had intended to do that, we could have done

that. That was never the issue. The issue and we emphatically stated at the time because the question was asked of us on the record where the scope of the 5 K –

THE COURT: Why didn't you just leave him alone and take the cocaine case and don't worry about the marijuana?

Why would the government knowing they've got a cocaine conviction be calling this man saying, "do you need 1,000 pounds of marijuana?" Except to make another entry on their books.

MR. GERGER: May I speak to that for just a second, your Honor? I want to speak –

MR. ISAACS: Let me – since Mr. Gerger –

MR. GERGER: I want to speak to a couple of points that have already gone by.

THE COURT: Let Mr. Gerger speak. I've been talking. You've been talking. Let's see if he has anything to say.

MR. GERGER: Judge, you know, you started off by asking how did Judge Black get to this point? As you said, if Mr. Witte would have pled to the cocaine, he would have been at a level 40. It doesn't matter if he would have pled to it or [24] not, the probation office considered it relevant conduct. Judge, we all know how the probation office writes its report. It talks to the agents and it says quote "Mason had an elicit drug organization," "Agent Norman, the DEA agent, would rather do both loads at once, the marijuana load and the cocaine

load." Quote "Pokorny, Mason and Witte aided and abetted to import to transport marijuana from Mexico and cocaine from Mexico and Guatemala."

It's the government that gave that information to probation. And, so, Mr. Isaacs says now there are two conspiracies, but they told the probation office there was one conspiracy. And Judge Black accepted that finding –

MR. ISAACS: Objection, your Honor, to that. That is emphatically untrue, and Mr. Gerger wasn't even there. That's not even part of the record.

THE COURT: These are his conclusions based on his reading of the PSI, and I understand that.

MR. GERGER: Judge Black accepted that finding. Made that finding, and the government says we should have appealed an upward departure. There was not an upward departure. Judge Black had a level of 40, and at the sentencing hearing, the government moved for a downward departure. Knowing that that was the level that Judge Black and the probation office had concluded, Judge Black departed downward, and we went on our way. The government did not appeal, and we have not pursued an [25] appeal.

I just want to make two brief points, your Honor. The tapes that Mr. Isaacs talks about discussed both marijuana and cocaine, and Mr. Isaacs says that Mr. Witte isn't harmed because he has to get a concurrent sentence. Well, the problem, Judge, is that Mr. Witte cooperated –

THE COURT: He may not be at a different level, but he'd have some relevant conduct to be considered.

MR. GERGER: Well, he wouldn't get his 5 K departure. He debriefed. He got a departure, and now they want to charge him for something that will carry the same offense level 288 months or whatever it is, and say, we're going to take away that downward departure, and that's what's so unfair.

THE COURT: Would the amount of cocaine that was being negotiated in this quote "conspiracy" put it at the same level?

MR. GERGER: We'd be at the exact same level because the total conduct would be the exact same conduct that was in the last presentence report.

THE COURT: How much cocaine was being negotiated?

MR. GERGER: I think 2,000 pounds.

MR. ISAACS: Well, no, that's not true, your Honor. There were supposed to be several loads that were going to be going through. The load that we took them down on was just the first –

THE COURT: I know, but you know what I begin to do in [26] this process? I begin to say, okay, you've got a conspiracy, now, how much cocaine did they get? Because the problem is that the very thing that's happening now could happen to someone later on. That is, in this process, that is that you – that a person enters a plea of guilty for conspiracy, and I had this in a heroine case involving some Nigerians. The guy enters a plea of guilty for conspiracy, and then we get into a tussle and an argument about whether or not the fact that he delivered 50 grams is the amount of stuff that I could find him in

possession of, because, "well, we talked about, Judge, we talked about two kilos of heroine and we talked about this, and we talked about that."

The point is that this conversation is a two-way conversation. The government is not standing on the sideline waiting on somebody to whisper some number in their ear. They go looking for this stuff. This is a part of the government's war on drugs. And so, the point is, that if you walked up to anybody who was selling anything and asked them for some amount of whatever it is they're selling, you're going to get a – you're going to generally get a positive response.

So, the question is as soon as you get through prosecuting him for that delivery of 50 grams on a Monday, then you can charge him with conspiracy the day following that because you had another conversation with him about the delivery of some more. And so, you've got this possession on [27] Monday, and you've got the conspiracy starting on Tuesday through Friday that you want to prosecute him for. This is the very kind of thing that I would be concerned about, and my statement to you is this: The question really is how much cocaine did they deliver? If they took them down with 200 pounds or 200 kilos, that's how much cocaine they were talking about as far as I'm concerned because I don't want to know what they talked about in terms of what their future negotiations may be.

MR. ISAACS: Your Honor, let me say this. If I understand the example you're giving, we're talking about the same course of conduct. We're talking about doing the same course of – same scheme.

THE COURT: We're using all these nice terms, Mr. Isaacs, to separate a deal. I mean, we can say, okay, "course of conduct" means from A to B, and after that, it becomes something else."

MR. ISAACS: But, your Honor, that's the whole premise of this. In the case at Bar here, we have a situation where Mr. Witte and his compadres were supplying in Mexico controlled substances to be imported into the United States. It wasn't the government asking –

THE COURT: But it wasn't violating our law.

MR. ISAACS: To import into the United States is a violation of our law.

[28] THE COURT: Once it comes over.

MR. ISAACS: It doesn't even have to come across the border, your Honor. All there has to be is an intent to conspire to bring it across the border and that they made substantial steps towards doing that, that was the violation. The second case was something completely different. This is when Mr. Witte comes to the government, and says, "Hey, listen. You got any marijuana to sell?" It was completely two different fact patterns.

THE COURT: I don't think that's what – that's not what the PSI says, and that's not what the motion says. It says the government after it laid off of him a period of time, called him up and talked to him about some marijuana.

MR. ISAACS: Well, your Honor, I think if you will look at the rearraignment, that's not the facts. The facts is stated in the rearraignment which is what Mr. Witte pled guilty to, the issue here is whether or not – I

think, in fact, if I recall, Mr. Witte objected to the government stating that it was he who called first, and he stated that the agents called first, but he did not deny the substance of what the offense was about.

THE COURT: No, and I don't think that anybody is denying that. But what I'm saying is, this is the government knowing that this man – they've got this man on video tape. They've got a movie of him doing this cocaine deal in Mexico or [29] some other place. And then they, then they say, well, let's cool off. Let's let this cool off. Then six months later, they say, "Hey, you want to do some marijuana? Everything is cooled off now."

MR. ISAACS: It wasn't cooled off, your Honor. There was an investigation trying to find Mr. Pokorny. Mr. Pokorny was a target that they had not gotten. He was the, as far as we were concerned, as far as the government was concerned, Mr. Pokorny was the one who was leading up this operation, and I can't go into – Mr. Pokorny is not here. But the fact is, is that –

THE COURT: Mr. Sherman is here. Are you here, Mr. Sherman?

MR. SHERMAN: I am very appreciative of what I'm listening to.

THE COURT: Of being acknowledged?

MR. SHERMAN: That's the real word.

MR. ISAACS: But the long and short of it is that the government wanted to get Mr. Pokorny. I mean, whether or not the Court approved of whether or not this was efficient or not efficient with respect to the way that the government was investigating their case, it was not

illegal. There was nothing unethical about it. It was the way they were trying to proceed upon investigating their case. It resulted in what the government wanted, which is we've captured Mr. Pokorny. He was [30] never aware of the fact that the government was looking for him as hard – didn't think he was ever going to be caught. The fact is we did finally catch him.

Nothing that Mr. Witte did ever helped us to catch him. Never did anything of the kind, and with respect to the only thing that he did with respect to that marijuana case, is he as a result of his plea, Mr. Kelly, his co-conspirator in that marijuana case pled guilty.

THE COURT: It helped the government a lot.

MR. ISAACS: And we got rid of that case. He got a 5 K for purposes of that marijuana case, and that's where we stand. I agree with –

THE COURT: I don't think he got a 5 K. I think we had some words said, but he never got a 5 K.

MR. ISAACS: Had there been no 5 K, then he would have gotten some 300. and some odd months in that case.

THE COURT: Had there not been this cocaine thing that was going on, this man would have gotten, would have probably gotten 60 months or less.

MR. ISAACS: He'd still be facing what he's facing today.

THE COURT: Well, no, he wouldn't have, because the point is the agents wouldn't have been so

aggressive to say, "Oh, yeah, we've got this cocaine thing we're doing out here, and we've got this business going."

[31] MR. ISAACS: Your Honor, I think we can get the probation officer up here.

THE COURT: I've got that report. We can read it.

MR. ISAACS: We can put the probation officer on the stand to state that it wasn't the government. In fact, the government called the probation officer and said, "Don't put that in." We asked them not to put that in. We said that that is not applicable. That is not relevant conduct under 1 (b) 1.3. We argued it in fact. We argued it –

THE COURT: Then why would the agents go in there and give him this information?

MR. ISAACS: Because, your Honor, the government –

THE COURT: They didn't pick it up off the street.

MR. ISAACS: The government is under a burden.

THE COURT: And that's why Probation put it in there, too. They have an obligation once it's revealed not to withhold that from me. That's the problem. See, you say you've got an obligation, a responsibility to tell, so does Probation. And so, now it's all, it's all subsumed, all of this information about his cocaine deal is subsumed in his marijuana deal. So, he ends up with a 40 point – he ends up on the Richter scale at 40 points rather than at 26.

MR. ISAACS: Your Honor, the thing is is that the Court has taken into consideration conduct which was not charged in the offense was not part of it. We have ample case [32] cases that –

THE COURT: For which he has been punished.

MR. ISAACS: Your Honor, we have cited cases in our brief where a man was charged with kidnaping in one jurisdiction and murder in another. He got life in one jurisdiction and then in the other jurisdiction for kidnaping, he got death because they used the murder as a basis for the felony murder charge. And that was two different separate jurisdictions. He got, and I would dare say that getting the death penalty for a case –

THE COURT: I suspect those offenses were committed in separate states, and that is the province of each state.

MR. ISAACS: But they were part of the same course of conduct.

THE COURT: Well –

MR. ISAACS: The man was kidnaped in one state and driven across the line to another state where he was murdered.

THE COURT: Right. And I've seen states where one guy gets the death penalty in Texas; take him to Louisiana, give him death there; take him to Florida, give him death there. I mean, as though this man's got six or eight lives.

MR. ISAACS: And the Supreme court said that the use of that already – that conviction for murder was

not double jeopardy to enhance or to assess the death penalty.

THE COURT: These are two different agencies dealing [33] out of the same poison well; but when the same agent deals out of the same poison well and deals two different series of poison, that's a totally different thing. That's what we're talking about.

MR. ISAACS: I'm confused with the Court using the terminology of "poison."

THE COURT: I mean, this man is serving time, that's poison.

MR. ISAACS: Does the Court mean that somehow, that it violates some constitutional provision or some legal provision?

THE COURT: That's what I think I've got to figure out, whether or not you as the government unit can dip into the well twice or the same well to get two different convictions not so much for conviction purposes, but for punishment purposes –

MR. ISAACS: Your Honor, as the Court is –

THE COURT: No, excuse me.

Because the point is that the offense level computation in my opinion at this point would not be significantly different than the one he's already received which is the one that is excessive and beyond what he would have received had the – had the officers or agents handled the investigation appropriately because he should never have been scored at that point.

MR. ISAACS: Your Honor, first of all, if this [34] gentlemen goes – the government would never stipulate to acceptance of responsibility on a case like this. We stipulated acceptance of responsibility for his marijuana case. It would be a different scoring pattern. He got acceptance of responsibility beyond the 5 K because he pled guilty to the marijuana case. Under this cocaine case, had he not –

THE COURT: We're talking about two or three points at most.

MR. ISAACS: It can be substantial at the range we're talking about.

THE COURT: We're not really talking about any points, because the scoring would begin at 40 or 42, and the acceptance of responsibility is to take away. That's what was taken away, three points, two or three points for acceptance of responsibility, and Judge Black was kind enough to give him five additional points. Six or eight points for a 5 K 1 departure, that's some kindness. Think about it. I mean, you know, here is a man that should have been sentenced at 60 months or less, and he gets 144 months.

MR. ISAACS: Your Honor, the bottom line is is that the law, first of all, tells the government how it can prosecute its cases. The guidelines, the government can do but so much and counsel can stand before the bench and argue and state that, hey, the presentence guideline is incorrectly calculated, and the defense counsel can argue that same thing [35] which they did in this particular case, and the Court says, hey –

THE COURT: Don't you think the government has a duty to appeal that void judgment just as much as the defendant? Because you know what you're dealing. You know what you want to do.

MR. ISAACS: But, your Honor, what burden do we have any more than the defense counsel?

THE COURT: To make sure that this issue didn't arise in this case, because I suspect that if these cases had been brought simultaneously, they would have all been brought in one lawsuit, and in one – you would have gotten a conviction on all these counts, and you would still have a man standing before you that you probably would have made a deal with on the marijuana so that he would have gotten less, he would have ended up with some kind of deal.

The point is that because these were not brought simultaneously, were not brought concurrently, they were – they're now before two different judges. We're looking at two different situations altogether.

MR. ISAACS: Your Honor, there was no way we could have brought these two cases together. We had two separate conspiracies. We had Mr. Witte and Mr. Kelly dealing with marijuana to possess with intent to distribute, and we had Mr. Witte, Mr. Dennis Mason and Mr. Pokorny dealing with agents to [36] import cocaine into the United States. Completely on two separate times, under the Blockberger Rule, under any rule they were two different deals. We would have had an objection under 404 (b), and anything else. If I had brought that marijuana case into this case, unless I had some basis

under 404 (b), we would have had reversible error all up and down. I couldn't do it. They are two –

THE COURT: Maybe on the marijuana, but you would have had him on something. You would have had nothing less than what you've got now.

MR. ISAACS: Your Honor, if there is anything that this Court is aware of that when I come into this courtroom, I go ahead and indict cases based upon the evidence that I have. Now, there is no way, and, in fact, I – there is no way that I could have used those two cases in the same indictment. There's just no way I could have done it.

THE COURT: I'm not sure based on what's in the PSI, and I don't know the facts. You see what I'm saying? I don't know, Mr. Isaacs. I'm saying that based on what is in the PSI, there is a suggestion that these cases could have been brought in a multiple count indictment against this man.

MR. ISAACS: But, your Honor –

THE COURT: I don't know that that's true or not.

MR. ISAACS: Your Honor, are we saying now that probation officers are going to stand in the place of the [37] United States Attorney's office and decide what type of cases we're going to prosecute?

THE COURT: No, I think that it's – if the DEA and these folks want to have five or six investigations involving somebody, they ought to keep their mouth shut and they should not go in there telling probation and these folk, "Now, we've got this other cocaine case we're

investigating these people on, and we want to tell you about it. But we don't want to tell you about it."

They don't have a duty to tell Probation anything.

MR. ISAACS: Your Honor, if you recall the scenario, the government never brought the issue up. Never at any time.

THE COURT: When you say "government," you're talking about a whole bunch of folk. Somebody brought it up.

MR. ISAACS: I am talking about my agents as well as my office.

THE COURT: Where did probation get this information?

MR. ISAACS: The issue was brought up, your Honor, if you look at the presentence report and especially at that July 12th hearing. You need to read that, your Honor. I respectfully request that the Court do that. It was defense counsel who came in and said, there is this other uncharged offense out here, and the government stood on this side and said, "Your Honor, we're not talking about any other uncharged [38] offenses. We're not bringing anything like that."

Defense counsel kept – then started laying out what it knew about. If you read that –

THE COURT: Probation wasn't there to hear that.

MR. ISAACS: Probation gets to see every single document that comes through here and gets to hear about it.

MR. GERGER: I don't think that was transcribed for the PSI, your Honor.

THE COURT: Probation wasn't there to hear that. Somebody had to give it to them; and, furthermore, all the agents didn't have to confirm it by giving them information, making statements.

MR. ISAACS: Once we are asked – I have already had situations, your Honor, where I have told the Court not – I don't want to turn over videos, and I have been required to turn over videos for PSI's. I had a case in which we had a situation, where it was absolutely, there was a guy who was charged with a cocaine offense, and it was some unrelated offense where he was beating up somebody, and it was a video about it. And I did not want to turn it over. Yet, I was required to do it.

THE COURT: Let me ask a question, other than the motion to dismiss, what remains to be done on this file before it's ready to go to trial? When are we scheduled for trial, Ms. Baird?

[39] THE CLERK: I believe it's scheduled for next week.

THE COURT: All right. In other words, if I – even if I were to grant your motion – Mr. Sherman, you're ready to go to trial next week, aren't you?

MR. SHERMAN: No, I'm not, Judge.

THE COURT: I'm sorry?

MR. SHERMAN: I'm not.

THE COURT: You're not ready?

How long does this case have to hang around here? This case has been on the docket now since 1992, September.

MR. SHERMAN: That may well be true, Judge. I am privy to, obviously, information that I would not otherwise have based upon the motion here if – and more importantly I've only been furnished with a copy of this video. I have not seen it. Mr. Gerger has it in his possession – the video.

MR. GERGER: I received those, and, Judge, I was always under the impression that Judge Black had seen those videos so we sent them to be copied, but we'll have those back today, and I can give a copy to Mr. Sherman.

MR. ISAACS: I will emphatically state on the record, Judge Black never saw any videos. He never saw one case report regarding this case. The only thing that came out of there was what ended up being in that PSI, and I reiterate, I submit that that is a result of defense counsel encouraging that issue to be put in the PSI.

[40] THE COURT: Well, I would have encouraged it, too, had the sentence been – well, apparently at that time, however, the sentence had not been determined. I guess that was back in '91 as opposed to '92 when the sentence was imposed.

So, what are you talking about, gentlemen, in terms of trial? What time do you need?

MR. SHERMAN: Judge, I don't see that my secretary caused a copy of my request for production of

documents to be filed with the Clerk's office. I don't know that it's in the file.

THE COURT: I don't have it. At least –

MR. SHERMAN: I have asked for certain information that I believe under the rules I'm entitled to, and the government has not responded.

THE COURT: Maybe they didn't receive it either?

MR. SHERMAN: Well, I notice here that this was January 28th. I don't show a green card that they received it. I understand it's two different locations, you go to the US Attorney's office Lyric Center or whether it comes here. I don't know that.

THE COURT: Okay. So, what I'm asking, what amount of time do you all need?

MR. SHERMAN: It's on – I didn't hear the date. You said it was March?

THE COURT: It's set next week, which is March 2nd or [41] 3rd.

MR. SHERMAN: Judge, I would be ready in your April term.

THE COURT: What is left to be disclosed, Mr. Isaacs?

MR. ISAACS: Your Honor, it is our usual practice, he can come down at any time. I will let him see. I will give him early Jencks with respect to any of the reports. I've shown them copies of the – of photographs we've blown up. They have been available as long as this

case has been on the docket. Mr. Gerger is aware. He's been able to come over to my office.

I think everybody has been sitting here worried about what's going to happen with respect to the Court's ruling on the issue we've been discussing this morning, but as my normal practice, any time they would like to come down to my office, I'll give them early Jencks. I'm not required to under the law, but I'll let them look at my DEA 6's, which I've always done in the past. They can look at all of the reports, and it's always been made available to them.

MR. SHERMAN: We've been sitting around waiting for disposition of this motion here. I think we had this matter set over the course of the Christmas Holidays and so forth.

THE COURT: We reset it for January 4.

MR. SHERMAN: That's right, and I have been in four trials since then.

[42] THE COURT: But these folks are in jail. We're not. Not yet, anyway.

MR. SHERMAN: I understand that, Judge. At least we don't rush into it as opposed to you get them out; if we can't, we're going to do the best we can.

THE COURT: Mr. – your client is not serving any time, is he?

MR. SHERMAN: Well, he is. He's serving time because he has a case out of northern California, I believe.

MR. ISAACS: He's due to be released.

THE COURT: He's due to be released?

MR. ISAACS: He's due to be released, your Honor. We have a hold on him for this trial, but he has, he was picked up on a parole violation, if I'm not mistaken in California. We then writted him here for purposes of this trial.

THE COURT: Well, let me say this. I'm really not of a mind to reset this case. If I'm going to try it, Mr. Sherman, I want to try it. I have –

MR. SHERMAN: I want to try it, too, Judge.

THE COURT: The problem I have on these criminal cases I've got too many of them, and I can't give them any of them to these other judges that don't have them. You see what happens? Judge Black gets a plea in one of these cases, and I'm going to end up trying the more serious offense. That's been my luck for the last five years.

[43] MR. SHERMAN: I understand that, Judge.

THE COURT: So, I have to try these cases, and they're not going away.

MR. ISAACS: Your Honor? Well, I'm sorry. I'd like to make a point about the sentencing.

THE COURT: We don't need to talk about sentencing right now.

MR. ISAACS: The issue, I think, with respect to the marijuana case, there's a transcript from that hearing and on page 18, I think the words of Judge Black were

interesting in which he says he's addressing Mr. Witte, and it's at the bottom. He says, "Do you know that both your lawyer and the government's lawyer are trying to convince me to disregard all of the talk about anything except this particular little marijuana deal? But for different reasons. Your lawyer wants me to disregard it so that I'll reduce your sentence in this case. The government's lawyer wants to disregard it so he can indict you in another case if he wants to."

It was clear at all times, your Honor, what this was about. There was never ever, and I assure you, your Honor, at any point in time had Mr. Witte made any objection to this, that perhaps Judge Black may have allowed him to withdraw his plea. He never asked for it.

THE COURT: Well, I'm not sure it would have made any difference since he'd already debriefed and told everything he [44] knew, and he'd already helped the government to make the deal. I mean, he was in a catch 22. The other man had already entered his plea of guilty.

MR. ISAACS: He never –

THE COURT: You got the benefit of the bargain.

MR. ISAACS: He never made any admissions concerning his complicity in that cocaine case.

THE COURT: But the point is that his entering his plea was enough to make Kelly step down and take a plea.

MR. ISAACS: For the marijuana case.

THE COURT: That's right.

MR. ISAACS: The much smaller marijuana case, and I agree with you. And that's why he got the 5 K, I agree. It had nothing at all to do with the case before this Court.

THE COURT: Well, I mean, you didn't have another case on Kelly, did you? What I'm saying, you got everything you had intended to get against Kelly, is what I'm saying?

MR. ISAACS: And Mr. Kelly wasn't the leader in that operation. Mr. Kelly was a minor – well, I shouldn't even call him a "minor player," but Mr. Kelly was a transporter. He was a truck driver.

Mr. Witte is the one that was transporting, given the money and all of the assets to be able to do this. In fact, on this second deal he comes up with another large sum of cash.

[45] THE COURT: Let me say this. Mr. Gerger has filed an awful lot of motions for continuance in my court and it probably is because he has a fairly good number of criminal cases to try. I don't intend to try to work around you all's schedule.

MR. GERGER: I just wanted to speak to that, your Honor. On March 1st –

THE COURT: I don't care what other judge's court you've got to go to trial in. I really don't. This case is probably as old if not older than some of the other judge's cases. If I were to take that date and move it to another date, I'm going to hear the same thing I've heard in the last three cases you've been involved in. "Judge,

I've got other things to do." You know, I don't know what I can do about that.

Gentlemen, I've got all my dates accounted for, and everything I've got is a week to two weeks. I think we're going to go to trial next week.

MR. GERGER: Judge, may I say something just for the record? On March 1st, I do start a trial with a detained client before Judge Rainey, and I understand your ruling, but I just wanted to state that on the record.

THE COURT: Well, did you tell Judge Rainey that you had a case set over here that was older than his case and had been reset?

[46] MR. GERGER: Well, your Honor, I did file a notice –

THE COURT: I just want to know whether or not you're being fair on the other side. Judge Rainey should know that you have been reset. You would have gone to trial in January, but the reason you didn't go is because you told me, I believe, in a motion that you had other cases pending. Probably one in Judge Rainey's court, maybe one in Judge Harmon's court. The case was reset.

Now, we're ready to go to trial, and there is another reason why you should be delayed. I just don't – I don't have a lot of sympathy.

MR. GERGER: The other thing, Judge, I wanted to mention is that if you deny our motion, I think –

THE COURT: Which motion?

MR. GERGER: The double jeopardy, the motion to dismiss. I think even the government recognizes that we have a right to appeal that unless it is a frivolous motion.

THE COURT: What, the motion denying it?

MR. GERGER: Yes, because it's a double jeopardy issue, and we cited the cases supporting that and I wanted to mention the government says we can't do that.

THE COURT: Well, if I agree with you that it's a double jeopardy issue, then I think you're entitled to relief; but if I disagree with you, the fact you may think it's jeopardy doesn't make it so.

[47] MR. GERGER: Well, Judge Black recently ruled in a case call Besborn, which you're familiar with the civil case, Universal Savings, that this is an issue that can be raised before trial. He granted our motion there, but I think the law is, Judge, that we can appeal your denial up to the Fifth Circuit unless our motion is –

THE COURT: You can do whatever you think is appropriate. I'm not suggesting you shouldn't, but – I mean, if I think it's a double jeopardy issue I'm certainly going to grant the relief, but I don't think you can just simply say that just because a man got a sentence in a case that he shouldn't have gotten that it automatically equals a double jeopardy.

MR. GERGER: Judge, I guess our view is a little different. We're saying he got the sentence he should have gotten because as you know, Judge, the government can charge you with stealing a cookie, but at sentencing, you get sentenced for stealing the whole store. That's the

way relevant conduct works, and then they can't come back and charge you for stealing the cookie jar, because it's already been factored in to the sentence.

THE COURT: They're saying not stealing the cookie jar, they want to charge him with conspiracy to steel [sic] the cookie jar.

MR. GERGER: Well, but they agreed in their last plea [48] to dismiss the conspiracy to steel the store. And, Judge, I guess, the last point is –

THE COURT: But you haven't pled guilty though so apparently there's no deal.

MR. GERGER: I beg your pardon?

THE COURT: Oh, I see what you mean. The conspiracy equating that to the marijuana.

MR. GERGER: Exactly.

THE COURT: I see.

MR. GERGER: So, Judge, we would ask you to stay at least Mr. Witte's trial under the case law that we've cited.

THE COURT: I'm not going to stay anything. The Fifth Circuit can stay whatever they want to stay.

MR. ISAACS: Your Honor, under two grounds. Number one, how can you –

THE COURT: I don't want to talk about this any more.

MR. ISAACS: But the other portion with respect to this particular statement. The issue isn't even

ripe here yet. He's pleading under the punishment issue of the double jeopardy clause. We haven't even gotten to the conviction on this case. And until there is a conviction, the issue of whether he's – if he's being punished twice for the same thing, doesn't even become a ripe issue. It's something that you – you know, we're talking about something that hasn't occurred yet, or cannot even occur until there is a conviction.

[49] So, I mean, the motion that we're hearing here right now, I believe that the government has already stated we believe it's premature in the first place. And so, there is no – I mean, until there is a conviction, the issue of whether or not he's being punished for the same crime, really does not come into being.

THE COURT: All right.

MR. GERGER: Judge, one last point. This is David Gerger for the record again. You asked if there are other motions that would need attention –

THE COURT: I don't have any motions in the file.

MR. GERGER: I just wanted to alert you. The only thing I can foresee is we would like to investigate whether Mr. Witte debriefed under a proffer letter, and –

THE COURT: I don't know how you're going to do it. Let me tell you. This case has been pending since September. It's not – it's not unusual for me to try these cases within a reasonable period of time, within three to four months. And I have a reason for doing that because I seem to never be able to get ahead of the curve on these

criminal cases. I have more than my share of criminal trials.

I spend generally twice as much time in court on these criminal cases than any other judges in this district, which says to me, that my cases are either being tried because people don't like me or because they think they're going to get [50] a better fair trial than they do with these other judges or because the deals aren't being made in my court. For whatever reason, I cannot slack up. I cannot let these cases back up on me, and I have to spend all of the summer working through these cases working through everybody's schedule of vacations and calendars and wrestling with lawyers trying to figure out how to get these cases tried. That's what I'm relegated to do simply because the parties are not entering pleas of guilty and because I am getting an – not – I'm getting a more than my share of these cases, and I have more criminal cases than these other judges, okay? So, I really don't care what these other judges are doing.

I do want to try these cases, and I want to get them over with so I don't have to look at this case as well as the other five that I've got scheduled, four that I've got scheduled for trial in March. I've got a full calendar, and I've got plenty to do.

MR. SHERMAN: Judge, may I? For the record, John Sherman.

I notice here, Judge, that I am scheduled for docket call and jury selection in the Eastern District on the 1st, and assuming that I'm caught up in Judge Cobb's and Judge Fisher's court over there, I mean, I'll be there until released.

THE COURT: I don't think there's a thing I can do [51] about it.

MR. SHERMAN: I understand that, I just want for the record to indicate, your Honor, what my situation is. And of course, this is nothing new to you because I've had this situation before.

THE COURT: Every week.

MR. SHERMAN: I hit the highway to get here.

THE COURT: Well, you know the way to Beaumont, don't you?

MR. SHERMAN: Many times.

THE COURT: I think the last time you just put it on cruise control and closed your eyes.

MR. SHERMAN: I did.

THE COURT: All right. Gentlemen, we'll see you Tuesday.

MR. SHERMAN: Very well.

(The proceedings were concluded in this matter.)

(Certificate Omitted In Printing)

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CIVIL ACTION NO. H-92-207
	§	
KURT STEVEN WITTE,	§	
	§	
Defendant.	§	

ORDER DISMISSING INDICTMENT AS TO KURT STEVEN WITTE

Pending before the Court is the defendant's Kurt Steven Witte, motion to dismiss because of double jeopardy and because of his claim that the government, in bringing these charges, breached its plea agreement with him. After reviewing the defendant's motion and the attachments and the government's response to the motion, the Court determines that the motion should be granted.

On March 4, 1991, a two-count indictment was filed in this District against the defendant in cause number H-91-33 charging him with conspiracy to process with intent to distribute marijuana and with aiding and abetting in the attempt to possess with intent to distribute marijuana, in violation of Title 21 U.S.C. §§841(a)(1), (b)(1)(B) and 846 and Title 18 U.S.C. §2. Subsequently, the defendant entered a plea of guilty to Count 2, the aiding

and abetting charge, pursuant to a plea agreement. That agreement provided that, in exchange for his plea of guilty and agreement to cooperate with the government in the marijuana case, the government would dismiss Count 1 of the indictment (*the conspiracy count*) and if it deemed the defendant's cooperation substantial a U.S.S.G. §5K1.1 motion for a downward departure in sentence would be filed.

As agreed, the co-defendant pled guilty and the government filed a §5K1.1 motion for a downward departure in sentencing. The defendant was sentenced on or about July 10, 1992. At that time a Presentence Report had been completed and filed and the sentencing judge sentenced the defendant to 144 months confinement in federal prison. In settling on this sentence, the sentencing court adopted the factual statements contained in the Report, particularly those in the "offense conduct" section.

The court arrived at an offense level of 40 by determining that the defendant had discussed and, therefore, intended to deliver 15 tons of marijuana from Mexico, 500 kilograms of cocaine from Guatemala, 591 kilograms of cocaine from Mexico, and was involved in a marijuana reverse buy, involving 1,000 pounds of marijuana in Houston, Texas. The probation officer, pursuant to U.S.S.G. §2D1.4, converted the 1091 kilograms of cocaine into the equivalent kilograms of marijuana. (232,261.6 kilograms).

Having established the marijuana equivalency, the probation officer concluded that the offense level of 40 was appropriate because the amount of marijuana involved was at least 100,000 kilograms but less than

300,000 kilograms. The probation officer determined that the defendant played an aggravating role and, pursuant to U.S.S.G. §3B1.1(c), increased the defendant's offense level by two (2) resulting in an adjusted offense level of 42. This offense level permitted the court to sentence the defendant between 360 months and life confinement.

When the defendant appeared for sentencing, the court, in accordance with the government's motion for a departure pursuant to U.S.S.G. §5K1.1 sentencing, sentenced the defendant to 144 months confinement, essentially sentencing the defendant at offense levels 32 or 33. *(Levels 32 and 33 together permit sentencing between 121 and 168 months).*

On September 2, 1992, the government caused a second indictment to be returned against the defendant wherein the defendant is charged with conspiracy to import cocaine into the United States (Count 1) and aiding and abetting the attempt to import cocaine into the United States (Count 2). It is this indictment that is the subject of this motion.

Contentions:

The government contends that the charges of conspiracy to import cocaine and aiding and abetting charged in this case are separate and distinct offenses from the conspiracy and aiding and abetting the possession with intent to distribute marijuana charges filed in cause number H-91-33. The government points out that the evidence concerning the cocaine offenses occurred between August 18, 1989, and August 15, 1990, some

seven (7) months prior to the marijuana offenses. Therefore, double jeopardy does not apply.

The government also contends that, because the sentence on the marijuana conviction must be served concurrently with any sentence on a cocaine conviction, the defendant suffers no harm.

The defendant contends that jeopardy attached when the defendant was sentenced based upon consideration of offense conduct that occurred in 1989 and 1990. The defendant contends that, because his punishment, including the §5K1.1 downward departure, exceeded the maximum punishment that the defendant could have been sentenced to had he been sentenced only on the marijuana offense, the plea agreement is breached by this current indictment.

Discussion:

The two components of the double jeopardy principle provide protection against a subsequent prosecution for the same offense and against multiple punishments. *See Grady v. Corbin*, 495 U.S. 588 (1990); *see also United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991).

In the case at bar, the Court focuses only on the second prong of the double jeopardy protection. In this vein, *Ball v. United States*, 470 U.S. 856 (1985), is instructive. In *Ball*, the Court held that the Congress, in enacting the Sentencing Guidelines, did not intend to punish the same offense under two separate statutes: (the sentencing guidelines vs. the criminal statutes). The guidelines support this observation. Under §3D1.1(a), the "Procedure

for determining Offense Level on Multiple Counts", the guidelines provide that:

> "[W]hen a defendant has been convicted of more than one count, the court shall:
>
> (1) Group the Counts resulting in conviction into distinct Groups of Closely-Related Counts ('Groups') by applying the rules specified in §3D1.2.

Section 3D1.2 speaks to the circumstance where the same victim is involved in two or more acts or transactions by a common criminal objective or constituting part of a common scheme or plan. The fact that offenses occur at different times or that offenses may involve different types of drug activity is of no moment. (*See* Commentary U.S.S.G. §3D1.2). Moreover, even if the criminal objective or scheme constitutes or is composed of legally distinct offenses occurring at different times, the teachings of *Ball* still apply.

The circuit court in *Koonce* expressed the same view. 945 F.2d 1145. Koonce was charged with one count of distributing an unspecified amount of methamphetamine. When the trial court calculated the sentence, it considered the methamphetamine seized at the defendant's residence as well as a quantity sold to a co-defendant. The Court sentenced Koonce after considering all of the methamphetamine identified.

Later, the government decided to prosecute Koonce on the methamphetamine seized at the defendant's home. There as here, the government argued separate and distinct crimes, and no harm in the concurrent sentencing

scheme. In rejecting the arguments, the circuit court concluded that the trial court had aggregated Koonce's related crimes and conduct, prior and subsequent, in computing the base offense level and had sentenced him accordingly. Thus, the circuit court concluded that a subsequent punishment would violate the double jeopardy clause of the federal Constitution.

That reasoning and conclusion apply in the case at bar. The government cannot be permitted to craft or develop a scheme by which a person may be twice punished. See *Koonce*, 945 F.2d 1145. This limitation is for a good reason. The government, with its awesome power, gets to choose the crime(s) for which a citizen may be prosecuted. For example, in this case, the marijuana charge resulted from a marijuana reverse buy. Readily, one can see that the government could orchestrate any number of individual drug transactions over a period of months or years and charge each transaction as a separate violation. Certainly, the government should be permitted to decide from which well it draws the poison, but it cannot then declare successive draws as constituting different poisons.

The findings of the sentencing judge in the marijuana conviction show that drug dealings between the defendant and the undercover agents was "reactivated" in June 1990. At that time, the undercover agents wanted both marijuana and cocaine imported into the United States. When a shipment of cocaine was seized in August of 1990, all contact between the undercover agents and the defendant ceased. The activity resumed in January 1991, when an undercover agent contacted the defendant. This

contact resulted in the defendant's conviction on the marijuana charge. The sentencing court found that the June and July 1990, meetings were significant and permitted the establishment of the "infrastructure" of the subsequent marijuana conviction. Armed with this evidence, it is no wonder that the sentencing court saw the activity in January of 1991 and June 1990 as a series of transactions constituting one common scheme or plan.

It is this Court's opinion that the prosecution of the defendant on the cocaine conspiracy and substantive count constitutes a violation of the Double Jeopardy Clause of the United States Constitution because it seeks to punish a second time conduct already punished.

The effect of permitting such carving also defeats the spirit and intent of the plea bargaining process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away.

It is ORDERED that the defendant's Kurt Steven Witte, motion to dismiss is hereby GRANTED.

Signed this 24th day of February, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Steven Kurt WITTIE, Defendant-Appellee.

No. 93-2245.

June 23, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM and WIENER, Circuit Judges; KAUFMAN,* District Judge.

WIENER, Circuit Judge:

Plaintiff-Appellant the United States (the government) appeals the district court's dismissal of its two-count indictment that charged Defendant-Appellee Steven Kurt Witte[1] with conspiracy and attempt to import 1,091 kilograms of cocaine into the United States. The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy clause of the Fifth Amendment through inclusion of the indicted offense in relevant conduct at sentencing for a related offense to determine Witte's base offense level. We disagree with the district court's conclusion that Witte

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* District Judge of the District of Maryland, sitting by designation.

[1] Witte, not Wittie, is the correct spelling.

would be subjected to impermissible multiple punishments for the same offense and therefore reverse and remand.

I
FACTS AND PROCEEDINGS

In August 1989, undercover DEA Agent Roger Norman negotiated with Dennis Mason in Tucson, Arizona to transport marijuana from Mexico into the United States. The negotiations were unsuccessful, but discussions between Norman and Mason resumed in Houston in June 1990. At that time, Witte, Mason, and Tom Pokorny planned to import marijuana from Mexico and cocaine from Guatemala. Both the Mexico deal and the Guatemala deal were going on simultaneously. Norman's job would be to fly the contraband into the United States.

In July 1990, the Mexican marijuana source advised that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The following month, Norman was told that the Mexicans were ready with 4,400 pounds of marijuana. Once Norman learned the coordinates of the airstrip, arrangements were made to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, 591 kilograms of cocaine were seized. The following day, while still undercover, Norman met Witte to explain that the pilots had been unable to land in Mexico because police had shown up at the airstrip.

Witte, Mason, and Pokorny were not charged with conspiracy and attempt to import cocaine at the time

because Mason was incarcerated in Mexico and Pokorny's whereabouts were under investigation. All contact between Witte and Norman ceased until January 1991.

Norman next contacted Witte in January 1991 and asked Witte if he were interested in purchasing 1000 pounds of marijuana from Norman. Witte answered affirmatively, and said that he would call Norman to tell him whether he could raise the $50,000 downpayment. Witte telephoned three days later from Denver, Colorado stating that he had the downpayment. Witte asked Norman – who still had possession of Witte's horse trailer from the prior activities – to return the trailer so that it could be used as a load vehicle for the marijuana. Witte stated that he would bring from Denver a motor home owned by Sam Kelly to use as a second load vehicle.

On February 7, 1991, Witte met Norman in Houston and informed him that he could only come up with half of the downpayment. Norman agreed to give Witte 1000 pounds of marijuana for $25,000 in downpayment and to allow Witte three days to obtain the balance. Witte introduced Norman to Kelly and showed Kelly's motor home and its various hidden compartments to Norman. Fellow undercover officers took the motor home and trailer to load the marijuana, at which time Witte and Kelly took Norman to Witte's hotel room to view the money. The two vehicles arrived loaded with approximately 375 pounds of marijuana.[2] Witte and Kelly took possession and were promptly arrested.

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[2] The vehicles were actually loaded with approximately 1,000 pounds of marijuana, but the government stipulated to a lesser quantity.

The government indicted Witte for (1) conspiring to possess with intent to distribute more than 100 kilograms of marijuana[3] and (2) aiding and abetting possession with intent to distribute marijuana (collectively, the marijuana offense).[4] The charges resulted from the January-February 1991 "reverse-buy" of marijuana. Facing a statutory range of 5-40 years,[5] Witte entered a Rule 11(e)(1)(B) plea agreement with the government.

Witte pleaded guilty to the substantive count of aiding and abetting possession with intent to distribute marijuana and agreed to cooperate with the government by providing truthful and complete information concerning the charged offense as well as any others about which he might be questioned. The government agreed to dismiss count one of the indictment – conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991 – and to file a § 5K1.1 motion if Witte's cooperation amounted to substantial assistance. Although not expressed in the recitation of terms of the agreement, the government states that Witte was also promised a recommendation to a three-year cap if he brought in Pokorny, who was involved in the cocaine offense. Although Witte did not assist the government in locating Pokorny, Witte's cooperation did cause his co-defendant in the marijuana offense, Sam Kelly, to plead guilty.

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[3] 21 U.S.C. § 841(a)(1), (b)(1)(B); 21 U.S.C. § 846.

[4] 21 U.S.C. § 841(a)(1), (b)(1)(B); 18 U.S.C. § 2.

[5] 21 U.S.C. § 841(b)(1)(B).

At sentencing, the district court found that the marijuana and cocaine offenses were part of the "same course of conduct." Over objections by both Witte and the government, the court included the cocaine in relevant conduct to determine Witte's base offense level.[6] The government urged the court to accept the parties' position that the cocaine deal was not relevant to the marijuana deal. The government argued against inclusion of the cocaine because it planned to indict Witte later for the cocaine offense. If the cocaine were not included in relevant conduct, the government could seek consecutive sentences for the cocaine and marijuana offenses. On the other hand, Witte objected to inclusion of the cocaine because he hoped for a shorter sentence: if only the 375 pounds of marijuana were considered, the Guideline range would be 63 to 78 months rather than 292 to 365 months.

Witte's base offense level was pegged at 40, with a Guideline range of 292 to 365 months. From that base offense level, Witte received a 2-level increase for his aggravating role in the offense and an offsetting 2-level decrease for acceptance of responsibility The court granted the government's § 5K1.1 motion for downward departure based on Witte's substantial assistance. By virtue of that departure, Witte was sentenced to 144 months – 148 months below the minimum sentence of 292 months

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[6] It is not clear whether the court determined the quantity of drugs involved in the cocaine offense to be 591 kilos (the amount seized) or 1,091 kilos (the amount seized plus an additional 500 kilos discussed). But inclusion of either quantity in relevant conduct results in a Guideline range of 40 (500-1500 kilos of cocaine).

under the pre-departure Guideline range. Witte appealed, but the appeal was dismissed due to Witte's failure to file a brief.

The government then indicted Witte and co-defendant Pokorny on two additional counts: (1) conspiring to import cocaine[7] and (2) aiding and abetting in the attempt to import cocaine[8] (collectively, the cocaine offense).[9] The indictment alleges that, between August 1989 and August 1990, Witte tried to import about 1,091 kilograms of cocaine from Central America. Witte moved to dismiss, arguing that he had already been punished for the cocaine offense because the cocaine was included in relevant conduct at sentencing for the marijuana offense. Witte also argued that the indictment breached the plea agreement.

The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment because the indicted offense had been included in relevant conduct at sentencing for the marijuana offense to determine Witte's base offense level. The court's conclusion on the breach of the plea agreement issue is not so clear, but it does not appear that the indictment was dismissed on that basis.[10]

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[7] 21 U.S.C. §§ 952(a), 960(b)(2)(B), 963.

[8] 21 U.S.C. §§ 952(a), 960(b)(2)(B) and 18 U.S.C. § 2.

[9] Although the "cocaine offense" involved the importation of cocaine and marijuana, it is referred to as the cocaine offense to distinguish it from the 1991 activities involving marijuana – the "marijuana offense."

[10] The court stated that "[t]he effect of permitting such carving also defeats the spirit and intent of the plea bargaining

The government timely appealed the dismissal of the indictment.

II
ANALYSIS

A *Double Jeopardy*

1. Standard of Review

We review de novo the dismissal of the cocaine indictment on grounds of double jeopardy.[11]

2. Multiple Punishments Prohibited?

The Double Jeopardy Clause provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb."[12] The Supreme Court has left no doubt that the clause protects defendants from both multiple prosecutions and multiple punishments for the "same offense."[13] Witte argues that the government's present attempt to punish him for the cocaine offense violates double jeopardy's multiple punishments prong: he

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process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away." The minute entry reads, "[T]he motion to dismiss on the basis of double jeopardy is granted."

[11] *United States v. Vasquez-Rodriguez*, 978 F.2d 867, 870 (5th Cir.1992); *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir.), *cert. denied*, 451 U.S. 974, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981).

[12] U.S. CONST. amend. V.

[13] *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076-77, 23 L.Ed.2d 656 (1969).

has already been "punished" for the cocaine offense charged in the subject indictment.

At the outset, we note the importance of distinguishing double jeopardy's prohibition of multiple prosecutions from its protection against impermissible multiple punishments. Although multiple prosecutions, i.e., more than one *prosecution* by the same sovereign for the same offense, always violate double jeopardy,[14] multiple *punishments* for the same offense *may* or *may not* violate double jeopardy. That is because Congress (or a state legislature) determines the scope of the constitutional protection in the multiple punishments context. If the legislature intended to impose multiple punishments for the same offense, imposition of such sentences does not violated the Constitution.[15] The purpose of the Double Jeopardy Clause in the multiple punishments context is to ensure that the punishment assessed does not exceed that authorized by the legislature (either the length of the sentence or the number of times that the sentence is imposed).[16]

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[14] We emphasize that the indictment or the prosecution does not run afoul of the prohibition against multiple prosecutions. Witte is not subject to multiple prosecutions for the cocaine offense – he was never placed in jeopardy for that offense. Our concern is with the punishment that would result if Witte were to be prosecuted for the cocaine offense: he is potentially subject to multiple punishments for the cocaine offense.

[15] *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 678-79, 74 L.Ed.2d 535 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981)).

[16] *Jones v. Thomas*, 491 U.S. 376, 281, 109 S.Ct. 2522, 2525-26, 105 L.Ed.2d 322 (1989); *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985); *Missouri v. Hunter*,

For purposes of double jeopardy, the drugs involved in the "same offense" – conspiring and attempting to import cocaine – were included in relevant conduct to sentence Witte for the marijuana offense and are the subject of the dismissed indictment.[17] The pertinent issues are (1) whether inclusion of the cocaine in relevant conduct at sentencing for the marijuana offense punished Witte for the cocaine offense, and if so, (2) whether Congress has authorized single or multiple punishment for the cocaine offense. This double jeopardy issue is *res nova* in this circuit, but the Second and Tenth Circuits have considered it.[18] Both have concluded that a defendant's

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459 U.S. 359, 266-68, 103 S.Ct. 673, 678-79, 74 L.Ed.2d 535 (1983); *Pearce*, 395 U.S. at 711, 89 S.Ct. at 2072; *United States v. Martinez*, 931 F.2d 851, 853 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 268, 116 L.Ed.2d 221 (1991).

[17] Thus both parties assume that the "same offense" element is satisfied under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). But clearly the statute under which Witte was convicted and the statutes under which he is now indicted proscribe different offenses, i.e., aiding and abetting possession of a controlled substance (21 U.S.C. § 841(a)(1); 18 U.S.C. § 2), and conspiring to import, and aiding and abetting in the attempt to import, a controlled substance. (21 U.S.C. §§ 952(a), 963; 18 U.S.C. § 2) *Cf. Hunter*, 459 U.S. at 367, 103 S.Ct. at 678-79; *United States v. Cruce*, 21 F.3d 70, 75-76 (5th Cir.1994). We address the issues in this case, however, as they were presented by the parties.

[18] Since this appeal was argued and taken under submission, another panel of this court has addressed the same issue that is now before us and has concluded, as we do, that double jeopardy does not preclude the subsequent prosecution and conviction of conduct that was earlier included in relevant conduct. *See Cruce*, 21 F.3d 70.

acts included as relevant conduct in calculating punishment for one offense may not later form the basis of another indictment without violating double jeopardy.[19]

In *United States v. Koonce*,[20] the defendant was convicted of distributing 443 grams of methamphetamine that he had mailed to his cohort. The district court sentenced him, however, for 7,869 grams. That quantity included 443 grams proved at trial, 963 grams found in his home, and 6,463 grams that Koonce was purported to have sold on other occasions. Inclusion of the additional grams in "relevant conduct" increased Koonce's offense level under the Guidelines from 32 (range: 188 to 235 months) to 34 (range: 235-293 months). Unlike Witte, Koonce received the maximum statutory sentence for all of the drugs (240 months).[21]

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[19] *United States v. Koonce*, 945 F.2d 1145 (10th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1695, 118 L.Ed.2d 406 and ___ U.S. ___, 112 S.Ct. 1705, 118 L.Ed.2d 413 (1992); *United States v. McCormick*, 992 F.2d 437 (2d Cir.1993).

[20] *Id. Koonce* was relied on by the district court in dismissing the indictment.

[21] This fact does not distinguish *Koonce* from the case before us for purposes of double jeopardy analysis. If, like Koonce, Witte had received the statutory maximum sentence for all of the drugs (365 months), it might appear wasteful – though not a violation of double jeopardy – to prosecute him for the cocaine offense. But as Witte's counsel admitted at oral argument,the government does recognize some benefit from a second conviction: it receives a $50 cost assessment to balance the budget, and more importantly, the second conviction serves as a predicate for enhanced punishment under recidivist statutes. That second conviction reflects Witte's actual recidivist status.

The government then brought a second indictment charging Koonce with the 963 grams of methamphetamine found in his home. The Tenth Circuit employed a three-step analysis to determine whether double jeopardy was thereby violated: First, had Koonce been punished for the methamphetamine found at his residence? Second, if so, did Congress intend that an accused in Koonce's position receive *cumulative*–although not necessarily *consecutive*–sentences from two separate proceedings if both sentences punish the accused for exactly the same conduct? Finally, if the first two inquiries are answered affirmatively, does the second punishment constitute "double" punishment even though the sentence derived therefrom is specified to run concurrently with the first sentence?

In answering the initial inquiry, the court concluded that Koonce had been punished for the drugs found at his residence because his base offense level would have been lower had they not been included via the relevant conduct provisions of the Guidelines. The "real offense" approach of the Guidelines required that Koonce be *punished* for the acts included in relevant conduct; therefore, concluded the *Koonce* court, he was punished.[22]

Second, the *Koonce* court found that the government had failed to point out "any authority holding that Congress intended to punish a defendant a second time for conduct that [had] previously been aggregated into the base offense level for a related sentence in an earlier

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[22] *Id.* (emphasis added).

prosecution."[23] The court relied on (1) § 3D1.2's grouping requirement, which mandates that a defendant's base offense level be determined by aggregating drug quantities from multiple counts in a single proceeding, and (2) the Sentencing Commission's announced goal of preventing prosecutorial charge manipulation,[24] to determine that Congress intended only one punishment rather than multiple punishments. The purpose of grouping is to ensure that an accused receives the same sentence that he would have received had he been charged and convicted of one narcotics count based on the same totality of facts. Recognizing that Koonce had received the statutory maximum sentence possible for the total quantity of drugs, the Tenth Circuit concluded that Congress could not have intended a larger punishment if a defendant were prosecuted in two proceedings.

Third, the *Koonce* court concluded that even if the defendant's second sentence were specified to run totally concurrent with the first, a second sentence would violate double jeopardy. The court relied on *Ball v. United States*,[25] Ball, a previously convicted felon, was convicted in one proceeding for (1) the "receipt" of a firearm and (2) the "possession" of a firearm. He was sentenced to consecutive terms of imprisonment. On appeal, the Fourth Circuit remanded with instructions to modify the sentences to make them concurrent. The Supreme Court

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[23] *Id.*, 945 F.2d at 1151.

[24] *Id.*, 945 F.2d at 1151-52; United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A.4(a), policy statement (1993).

[25] 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

concluded that, as both offenses were established by the same criminal act, Congress had not intended to subject Ball to two *convictions*. Thus "one of the convictions, as well as its concurrent sentence, [was] unauthorized punishment for a separate offense."[26] In Koonce, the Tenth Circuit relied upon these statements to posit that a concurrent sentence can be "punishment."[27] As the Tenth Circuit had already decided that Congress had authorized only one punishment for that criminal act, the court concluded that this second punishment violated double jeopardy.

In *United States v. McCormick*,[28] the Second Circuit adopted *Koonce's* analytical framework. It affirmed the dismissal of bank fraud charges for acts that were used in a prior case as relevant conduct to compute the defendant's base offense level. McCormick was charged with bank fraud in Connecticut that resulted in a $75,000 loss. Subsequent to that indictment, McCormick was charged for bank fraud in Vermont that allegedly resulted in a $4 million loss. He was then convicted on the Connecticut

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[26] *Ball*, 470 U.S. at 864, 105 S.Ct. at 1673.

"A separate conviction, apart from the concurrent sentence, had potential adverse collateral consequences. . . . " *Id.* at 865, 105 S.Ct. at 1673-74 (noting the potential for an increased sentence under a recidivist statute, possible delays in parole eligibility, and the societal stigma that results from the conviction itself).

[27] *Koonce*, 945 F.2d at 1153. We do not disagree, but note that *any* sentence is punishment. The issue on which we part ways with the Tenth Circuit is whether a second punishment is authorized by Congress, the second element of the Tenth Circuit's analysis.

[28] 992 F.2d 437 (2d Cir. 1993).

bank fraud charge. At sentencing for the Connecticut conviction, the loss was calculated to be in the $2.5-5 million range, a sum that obviously included the Vermont loss. McCormick's motion to dismiss the Vermont bank fraud charges on double jeopardy grounds was granted.

The Second Circuit determined that inclusion of the Vermont amount in relevant conduct amounted to punishment for the Vermont fraud in the Connecticut proceedings, and that a second punishment for the Vermont loss would violate double jeopardy: The Sentencing Guidelines' grouping provision requires that defendants in fraud cases, like drug offenders, be assessed "a single punishment for a set of similar acts."[29] "The Guidelines achieve consistency in sentencing for fraud cases by grouping all of the relevant conduct and applying a single offense level to the whole course of conduct."[30] The Second Circuit concluded that Congress apparently did not intend to allow a defendant to be *prosecuted* for conduct already used to increase his or her offense level. Being skeptical of the way that the Tenth and Second Circuits reached those results, we now examine the double jeopardy question independently.

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[29] 992 F.2d at 440; *see* U.S.S.G. § 2F1.1, comment. (n.6) ("The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.".

[30] 992 F.2d at 440.

a. Inclusion of Cocaine in Relevant Conduct: Punishment?

First, the government contends that inclusion of the cocaine in relevant conduct to *calculate* the defendant's base offense level is legally no different that *enhancing* his sentence by increasing a base offense level to a higher level under the Guidelines because of prior criminal activity. As increasing a base offense level by use of prior crimes is not "punishment" for prior crimes, argues the government, neither is using prior crimes to calculate a base offense level punishment for those prior crimes. Thus, concludes the government, Witte has not been "punished" for the cocaine offense. Witte counters that although enhancement of a sentence may not be punishment, counting the cocaine to determine his base offense level, with a corresponding 287-month increase in the maximum possible length of his sentence, is punishment.

It is well-settled that using prior crimes to *"enhance"* a sentence does not impinge on double jeopardy, because defendants are not "punished" for crimes so considered.[31] Pre-Guidelines, uncharged criminal conduct could be "considered" at sentencing as aggravating circumstances and could still form the basis of a later indictment, conviction, and sentence without violating double

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[31] If a defendant is convicted of murder and given a life sentence, and is later convicted for having kidnapped the murder victim, the sentencing court may consider the fact that the kidnaping victim was murdered when assessing a death penalty rather than a life sentence without violating double jeopardy. *Williams v. Oklahoma*, 358 U.S. 576, 585-86, 79 S.Ct. 421, 426-27, 3 L.Ed. 2d 516 (1959).

jeopardy.[32] The "real offense" approach to relevant conduct, however, may well lead to the conclusion that Witte was "punished" for the cocaine offense.

Stepping back from the somewhat artificial distinction between enhancement and calculation of a base offense level, we examine whether, pre-Guidelines, the prosecution and punishment of Witte for the cocaine offense would have been foreclosed because Witte's cocaine activities were considered in imposing sentence for the marijuana offense. *Williams v. Oklahoma*[33] indicates that the answer is no. As the Supreme Court noted in *Williams*, the sentencing court "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[34]

> And in view of the obvious fact that, under the law of Oklahoma, kidnapping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor to have denied to him due process of law in violation of the Fourteenth Amendment.[35]

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[32] *Sekou v. Blackburn*, 796 F.2d 108, 111-12 (5th Cir.1986) ("[C]onsideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered." 796 F.2d at 112.).

[33] 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516.

[34] 358 U.S. at 585, 79 S.Ct. at 426-27.

[35] 358 U.S. at 586, 79 S.Ct. at 427.

In Witte's case, the sentencing court is required by the Guideline's relevant conduct rules to consider the circumstances surrounding the particular offense of conviction. We find it clear that, like the crimes of kidnap and murder of the kidnap victim in *Williams*, the marijuana charge to which Witte pleaded guilty and was sentenced is an offense separate and distinct from the cocaine offense.[36] If, in *Williams*, consideration of the conduct constituting the separate offense of murder to increase the severity of the sentence for kidnaping was not punishment for the conduct so considered, then the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct. Of course, there is double use of single acts, but *Williams* apparently permits this. Williams was given a life sentence for murder and then the same murder was used to step up his punishment for kidnaping to death.

The only ostensible missing link in this analysis lies in the answer to the question whether, when Williams was sentenced to life imprisonment for murder, the sentencing court considered the kidnaping of the murder victim. Although not clear from the text of *Williams*, we may fairly assume that the uncharged kidnaping was considered when Williams was sentenced for murder. After all, the sentencing court "[was] authorized, if not required to consider all of the mitigating and aggravating circumstances involved in the crime."[37] If so, then *Williams* is this case–*pre*-Guidelines.

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[36] *See supra* note 17.

[37] *Williams*, 358 U.S. at 585, 79 S.Ct. at 427.

The fact that Witte's double jeopardy challenge arises *post*-Guidelines does not change the analysis of the punishment issue presented in *Williams*. Before adoption of the Guidelines, judges exercised their sound discretion in determining the appropriate level of punishment within established statutory ranges of imprisonment. Post-Guideline, judges are still required to determine a sentence within an established statutory range. The Guidelines simply provide a formulae for what used to be left to trial court discretion. To improve consistency in sentencing, the Guidelines attempt to accommodate multiple uses of conduct. Specifically, the Guidelines require that when, in cases such as Witte's, the sentencing court has considered the marijuana conviction in determining the offense level for the cocaine offense, the court must impose concurrent sentences.[38]

Even if we assume arguendo that *Williams* does not absolutely dispose of this threshold punishment question, we would not end our analysis at this juncture. Rather, we accept for purposes of our analysis that Witte has been punished by inclusion of the cocaine activities in relevant conduct and proceed to consider whether a second punishment is nonetheless permitted by Congress.

b. Guidelines Authorize Multiple Punishment

We therefore turn to the Guidelines to determine the appropriate punishment–single or multiple – to be

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[38] U.S.S.G. § 5G1.3(b). This subsection will be discussed in further detail in Part B, Section 2 of this opinion.

assessed.[39] The Tenth Circuit's observation that grouping rules under the Guidelines prevents double counting and thus count manipulation is accurate. If Witte had been convicted in one proceeding of both the cocaine and marijuana offenses, grouping of counts – aggregation of the drug quantities – would result in a Guideline range of 292-365 months. The high end of the range serves as a cap to the *length* of the sentence (punishment) that Witte can receive for both offenses.[40] But the question here is whether Congress intended Witte to be subject to multiple punishments (a second punishment) for the cocaine – that had already been included in relevant conduct for a related sentence – as long as the aggregate length of his sentences did not exceed the lesser of the cap provided by the range or the statutory maximum sentence.

The Tenth Circuit found no authority in the Guidelines that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution.[41] But that court did not have the benefit of the present § 5G1.3(b) of the Guidelines, which Witte concedes in his motion to dismiss would require imposition of concurrent sentences if he were tried and

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[39] *United States v. McCormick*, 992 F.2d 437, 442 n. 1 (2d Cir.1993) (Mahoney, J., dissenting) (noting that the majority properly recognized that "in the sentencing area, Congressional intent is reflected in the Sentencing Guidelines").

[40] The same is true if Witte is convicted in two separate proceedings for these offenses. His punishment cannot exceed 365 months in length. As we will demonstrate, this is accomplished by imposing concurrent sentences.

[41] *Id.*, 945 F.2d at 1151.

convicted of the cocaine offense. Section 5G1.3 provides in pertinent part:

> *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment*
>
> (b) If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.[42]

The commentary to § 5G1.3(b), application note 2, reflects that

> Subsection (b) . . . addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3(Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions,[43] for the same

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[42] U.S.S.G. § 5G1.3.

[43] Two separate indictments were brought against Witte in the same federal jurisdiction, the Southern District of Texas (Houston division). Although subsection (b) discusses "two or more federal jurisdictions," Witte does not argue that § 5G1.3(b) does not apply on this basis. A common sense approach to that language is that subsection (b) also addresses prosecutions in "the same federal jurisdiction twice," i.e., the Southern District of Texas and the Southern District of Texas. Subsection (b) probably assumes that multiple counts resulting from the same course of conduct would be brought together if they occur in the same federal jurisdiction. Just as there are valid reasons for

> criminal conduct or for different criminal transactions that were part of the same course of conduct.[44]

The commentary clearly permits a defendant to be prosecuted – and sentenced – in more than one federal proceeding for different criminal offenses that were part of the *same course of conduct*.[45] More importantly, a defendant's base offense level for each offense of conviction – unless the Guidelines expressly provide otherwise – *must*

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bringing two separate indictments against a defendant in two federal jurisdictions, there are valid reasons for bringing two separate indictments against a defendant in the same jurisdiction. In this case, the government did not believe that the offenses were part of the same course of conduct and had not completed its investigation of the cocaine offense.

[44] U.S.S.G. § 5G1.3, comment. (n. 2).

[45] *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994). In *Cruce*, this circuit indicated its disagreement with the Tenth and Second Circuits' views in *Koonce* and *McCormick*. Therefore, in this opinion, this panel is not free to adopt the approach of those cases. In *Cruce*, as in this case, it is to be noted that the defendants faced punishment for conduct that had not been charged, but that had been included in relevant conduct when they were sentenced in an earlier prosecution. *Cruce* expressly states that consideration of relevant conduct does not punish defendants *for relevant conduct* so considered but *for the offense of conviction*. *Id.* at 75 n. 8. Despite the temporal differences noted by the majority in *McCormick* between those circumstances and the circumstances set forth in § 5G1.3(b), the court in *Cruce* concluded that § 5G1.3(b) applied to the defendants because "it is clear that Congress and the Sentencing Commission anticipated the imposition of punishment – whether concurrent or consecutive – in a second proceeding and, thus, did not intend to preclude such proceeding." *Id.* at 77 n. 11. Accordingly, *Cruce* held that the second punishment did not violate double jeopardy.

be determined on the basis of *all relevant conduct*.[46] The principle that all relevant conduct be considered in determining a defendant's base offense level is neither optional nor hortatory; it is mandatory.

Read in pari materia, § 5G1.3(b) clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense – and sentence him *again* for all relevant conduct. To repeat, this proposition merely reflects Congress's specific intent that *all* relevant conduct be considered in determining a defendant's sentence. Consequently, we find no basis for distinguishing the situation described by § 5G1.3(b) from the one before us today.

Like it or not, we are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings – and that Congress accomplishes this intent – not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction on both counts in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding. Thus § 5G1.3(b) is "authority . . . that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense

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[46] U.S.S.G. § 1B1.3(a).

level for a related sentence in an earlier prosecution," authority that the Tenth Circuit – without the benefit of § 5G1.3(b) in its present form – found lacking when it analyzed Koonce's double jeopardy challenge.[47]

The Second Circuit had the benefit of § 5G1.3(b) but distinguished the situation in *McCormick* from that described in § 5G1.3(b). That distinction concerns *when* the defendant will be punished for both offenses in a single sentencing proceeding, i.e., whether the defendant will be punished for both offenses at sentencing for the first offense (McCormick's situation) *or* at sentencing for the second offense (the Second Circuit's view of § 5G1.3(b). But in our view, under § 5G1.3(b) and relevant conduct principles, the defendant is punished for both offenses *both* at sentencing for the first offense and at sentencing for the second offense.

With all due respect, we believe that the Second Circuit's analysis of § 5G1.3(b) suffers from two errors: first, it ignores – under § 5G1.3(b) – the application of relevant conduct principles to sentencing for the first offense; second, it does not consider McCormick's situation *at the relevant stage* addressed by § 5G1.3(b), i.e., at the sentencing stage for purposes of the instant offense.[48]

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[47] *Koonce*, 945 F.2d at 1151.

[48] 992 F.2d at 441 n. 3. Again, it is the punishment or the sentence imposed for the cocaine offense, not the prosecution for that offense, that implicates double jeopardy concerns. If multiple punishments are impermissible, we foreclose a prosecution for the cocaine offense not because the prosecution would violate double jeopardy, but because it would be a waste of judicial resources to proceed to the sentencing stage only to have imposition of a sentence barred by double jeopardy.

The *McCormick* court did not consider that, *at sentencing* for the second offense, McCormick could be punished *again* for all relevant conduct. Section 5G1.3(b) assumes that a defendant has been prosecuted and convicted for the instant offense – an offense that was part of the *same course of conduct* as an offense for which there is already a conviction and for which an appropriate *Guidelines* sentence has been assessed (hence the application of relevant conduct at the first sentencing proceeding) – and that it has proceeded to the sentencing stage.

Nevertheless, the Second Circuit recognized that in a case governed by subsection (b), the Sentencing Commission would require concurrent sentencing to avoid multiple punishments.[49] Thus, two sentences, though concurrent, have been authorized by the legislature in this situation, and thus would not violate double jeopardy. The significance of this analysis should be obvious: it is not the subsequent *prosecution* that is affected, but the subsequent *sentence* that may be pronounced and the manner in which such sentence may be imposed, assuming that the permitted subsequent prosecution produces a conviction.

3. Sentencing for the Cocaine Offense

Witte argues that the drafters of § 5G1.3(b) could not have foreseen the circumstances of this case: a 5K1.1 motion in the first prosecution that will not pass to the second prosecution. Witte insists that it is unfair to allow

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[49] 992 F.2d at 441 n. 3.

the government – which received substantial assistance from a defendant in its initial prosecution of that defendant – to seek imposition of a *longer,* though concurrent, second sentence. In effect, Witte is asking this court to adopt a per se rule that the second sentence imposed cannot exceed the first if the first resulted from a § 5K1.1 motion, i.e., to "pass" the effect of a 5K1.1 motion from one sentencing proceeding for one offense of conviction to a subsequent sentencing proceeding for another offense of conviction. But Witte's otherwise appealing argument ignores an important aspect of the substantial assistance that he gave: It related only to the marijuana offense, not the cocaine offense. Significantly, Witte's argument also ignores application note 2 to § 5G1.3(b) and the background to this section, which makes clear that § 5G1.3(b) is intended to result in the appropriate incremental punishment that most nearly approximates the sentence that would have been imposed had both sentences been imposed at the same time.[50] This is accomplished both by (1) imposition of a concurrent sentence, and (2) giving credit for time served.

If Witte is ultimately convicted of the cocaine offense, the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses. Even so, there may be still be adjustments to the base offense level. For example, that level could be increased for an aggravating role or decreased for acceptance of responsibility.[51] For illustrative purposes, we assume that the

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[50] U.S.S.G. § 5G1.3, comment. (n. 2, backg'd).

[51] *See* U.S.S.G. § 5G1.3(b), comment. (n. 2).

offense level will again be 40, and that the Guideline range will be 292-365 months.[52] The sentencing court will then have to determine the appropriate *total* punishment for *both* offenses. For purposes of this illustration, we choose 292 months as the appropriate total punishment. Witte must then receive credit for time served. If, for example, Witte shall have served 30 months for the marijuana offense by the time of the second sentencing, the sentencing court must credit Witte with 30 months served, and impose a sentence of 262 months (292 minus 30) to run concurrently with the remainder of Witte's sentence for the marijuana offense. As the commentary to § 5G1.3(b) emphasizes, the 262-month sentence is not a departure from the Guidelines, but reflects a credit for Guidelines purposes for time that Witte has served. Under § 5G1.3(b), then, Congress allows "double punishment" for the cocaine offense but ameliorates its harsh impact and prevents punishment from exceeding the statutory maximum by causing sentences for both the marijuana and cocaine offenses to run concurrently and by giving credit for time served.

We turn now to the alternative basis urged by Witte for dismissal of the indictment.

B. *Breach of Plea Agreement*

Witte claims that the government breached the plea agreement by "re-indicting" the "same conspiracy." Again, as part of the plea agreement for the marijuana

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[52] The sentencing court could even depart from the applicable Guideline range in response to a § 5K1.1 motion.

offense, the government dismissed the first count against Witte, conspiring to possess with intent to distribute more than 100 kilograms of marijuana from January 25, 1991 to February 8, 1991.

1. Standard of Review

Whether the government has violated the terms of the plea agreement is a question of law, which on appeal is reviewed do novo.[53]

2. No Breach

In determining whether the government has breached a plea agreement, the court must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement."[54] The defendant must prove the underlying facts that establish a breach by a preponderance of the evidence.[55]

During the sentencing hearing, Witte expressed a belief that he would be immune from prosecution in other cases. But Witte's counsel immediately contradicted Witte's statement. Additionally, his counsel asked the court not to include the cocaine because it would deprive Witte of the opportunity to plead not guilty and go to trial on that offense, not – as Witte contends – so that he could argue "breach of the plea agreement." Witte was

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[53] *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir.1993).

[54] *Valencia*, 985 F.2d at 761 (citing *United States v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir. 1991)).

[55] *United States v. Hernandez*, 996 F.2d 62, 64 (5th Cir.1993).

expressly informed by the court that the government wanted to indict him later on the cocaine offense, and Witte expressed his understanding of this advice. Finally, Witte's substantial assistance did not relate to the cocaine offense, but only to the marijuana offense. Thus even if Witte somehow subjectively clung to the belief that he could not be prosecuted for the cocaine offense, that is not a reasonable understanding of the plea agreement. The government has not breached that agreement.

Witte nevertheless contends that the government's present indictment charges him with the count that was dismissed pursuant to the plea agreement. We disagree. This indictment charges Witte with conspiring and attempting to import 1,091 kilograms of cocaine between August 1989 and August 1990. The government dismissed a count of conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991. Witte argues, though, that the same conspiracy underlies both counts, and that the government is bound under either of two doctrines – (1) the law of the case, or (2) collateral estoppel – by a "same conspiracy" finding by the sentencing court. Witte premises his argument on the novel idea that the sentencing court's "same course of conduct" finding constitutes a "same conspiracy" finding. This argument is unavailing.

A same conspiracy finding may be necessary to include the acts and omissions of *others* as relevant conduct, but it is not necessary to include Witte's own acts in

relevant conduct.[56] The PSR Addendum refers to Witte's "agreement" (i.e., conspiracy), but the district court never specifically stated that he adopted the PSR or that specific finding. The only express finding by the sentencing court on this issue is that the relevant conduct spelled out in the PSR was "relevant conduct" *related to the charge* to which he pleaded guilty." Neither did the sentencing court find that the cocaine and marijuana offenses were part of the "same conspiracy" count that was dismissed.

Even if on dismissing the indictment the district court had found that the marijuana and cocaine offenses were part of the same conspiracy, we would review such a finding for clear error only. Under the facts of this case, it is obvious that two distinct conspiracies were involved: they were separated by time; they involved different co-conspirators; they involved different statutory offenses; they included different overt acts in each offense charged; and they occurred in different geographical locations.[57] Witte clearly has not been indicted for the same conspiracy count that was dismissed pursuant to the plea agreement.

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[56] U.S.S.G. § 1B1.3(a)(1)(A), (a)(1)(B), (a)(2).

[57] *United States v. Marable*, 578 F.2d 151, 154 (5th Cir.1978). In his brief, Witte demonstrates that the Guatemala cocaine and Mexico marijuana deals were part of the same conspiracy Witte's comparison is inapposite: the relevant inquiry is whether both foreign deals (the cocaine offenses) were part of the same conspiracy as the deal that occurred in the United States (the marijuana offenses).

III

CONCLUSION

For the foregoing reasons, we conclude that the district court improperly dismissed the indictment on double jeopardy grounds. Neither may the court's dismissal of the indictment be sustained on grounds that the government breached the plea agreement. The dismissal of the indictment is therefore REVERSED and the case REMANDED for proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 94-6187

Steven Kurt Witte,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 6, 1995

Supreme Court, U.S.
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FEB 21 1995
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No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas

H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders
440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a government prosecution and punishment for an offense violate the Double Jeopardy Clause if the offense already was included in relevant conduct for sentencing under the United States Sentencing Guidelines in a different and final prosecution?

LIST OF PARTIES

1. United States, in Cr. Nos. H-91-033 and H-92-207.
2. Steven Kurt Witte, in Cr. Nos. H-91-033 and H-92-207.
3. Ralph Christopher Neal (also known as Sam Richard Kelly), in Cr. No. H-91-033.
4. Tom Pokorny, in Cr. No. H-92-207.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTORY PROVISIONS INVOLVED 1

GUIDELINES PROVISIONS INVOLVED 1

STATEMENT 2

A. Offense Conduct 2

B. United States v. Witte and Kelly, Cr. No. H-91-033 5

C. United States v. Witte and Pokorny, Cr. No. H-92-207 9

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE UNITED STATES SENTENCING GUIDELINES MANDATE THE PUNISHMENT OF DRUG OFFENDERS FOR ALL REAL OFFENSES IN ONE PROCEEDING, AND MR. WITTE WAS PUNISHED FOR ALL REAL OFFENSES IN CASE NO. 91-033 14

TABLE OF CONTENTS – Continued

Page

A. The Sentencing Guidelines Implement Mandatory Modified Real Offense Sentencing to Effectuate the Goals of Uniformity and Proportionality and to Preclude the Danger of Charge Manipulation 14

B. The Relevant Conduct Provisions of the Guidelines Expressly Implement the Intent to Hold Offenders Accountable for All Charged and Uncharged Real Offenses in One Proceeding 18

C. The Guidelines and Commentary Regarding Drug Offenses Mandate the Punishment of Drug Offenders for All Real Offenses in One Proceeding and Protect Against Double Counting 20

D. Pursuant to the Guidelines, Mr. Witte Was Punished for All Real Offenses in Case No. 91-033 and Received a Procedurally Complete and Final Sentence for Those Offenses 23

II. THE DOUBLE JEOPARDY CLAUSE BARS PUNISHING MR. WITTE AGAIN FOR OFFENSES FOR WHICH HE ALREADY HAS BEEN PUNISHED 32

A. Congress Cannot Authorize the Imposition of Cumulative Punishment for One Offense in Two Criminal Proceedings, and the Fifth Circuit Thus Erred 32

TABLE OF CONTENTS – Continued

Page

B. Congress Has Incorporated the Guidelines into the Federal Criminal Code, and a Federal Court Cannot Ignore the Mandate of Congress and the Express Language of the Guidelines in Determining Whether a Defendant Is Being Twice Punished in Separate Proceedings for the Same Offenses 41

C. Punishing Mr. Witte Again in Case No. 92-207 Is Punishing Him Twice for the Same Offenses in Violation of the Double Jeopardy Clause 47

CONCLUSION 50

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

Page

CASES

Albernaz v. United States, 450 U.S. 333 (1981) 34, 45

Ashe v. Swenson, 397 U.S. 436 (1970) 49

Ball v. United States, 470 U.S. 856 (1985)..... 49

Bartkus v. Illinois, 359 U.S. 121 (1959) 49

Blockburger v. United States, 284 U.S. 299 (1932)...46, 47

Brown v. Ohio, 432 U.S. 161 (1977) 32, 49

Burns v. United States, 501 U.S. 129 (1991).....14, 43

Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994)..... 37

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S 102 (1980)..... 35

Crandon v. United States, 494 U.S. 152 (1990) 35, 38, 39, 40

Dep't of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994)..... 33

Grafton v. United States, 206 U.S. 333 (1907) 33

Green v. United States, 355 U.S. 184 (1957)..... 49

Harris v. Oklahoma, 433 U.S. 682 (1977)..... 42

Hughey v. United States, 495 U.S. 411 (1990) 35

Kohler Co. v. Moen Inc., 12 F.3d 632 (7th Cir. 1993) 35

Mail Order Ass'n of America v. United States Postal Service, 986 F.2d 509 (D.C. Cir. 1993).....35, 40

Missouri v. Hunter, 459 U.S. 359 (1983) 32, 34

TABLE OF AUTHORITIES – Continued

Page

Mistretta v. United States, 488 U.S. 361 (1989) 15, 43

Moskal v. United States, 498 U.S. 103 (1990) 35

New York v. Ferber, 458 U.S. 747 (1982) 35

Nichols v. United States, 114 S. Ct. 1921 (1994) 30

Ohio v. Johnson, 467 U.S. 493 (1984) 45

Pearce v. North Carolina, 395 U.S. 711 (1969) 32

Ray v. United States, 481 U.S. 736 (1987) 49

Sekou v. Blackburn, 796 F.2d 108 (5th Cir. 1986) 30

Stinson v. United States, 113 S. Ct. 1913 (1993) 15, 35

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 32

United States v. Colon, 905 F.2d 580 (2d Cir. 1990), *remanded for resentencing, sentence aff'd*, 961 F.2d 41 (2d Cir. 1992) 29

United States v. Davern, 970 F.2d 1490 (6th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1289 (1993) 43

United States v. Dixon, 113 S. Ct. 2849 (1993) .... *passim*

United States v. Duarte, 28 F.3d 47 (7th Cir. 1994) 31

United States v. Halper, 490 U.S. 435 (1989) 13, 32, 33, 34, 49

United States v. Jorn, 400 U.S. 470 (1971) 49

United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) 39, 40

United States v. Olano, 113 S. Ct. 1770 (1993) 26

TABLE OF AUTHORITIES – Continued

Page

United States v. R.L.C., 112 S. Ct. 1329 (1992).....42, 43

United States v. Wittie, 25 F.3d 250 (5th Cir. 1994).....1, 10, 11, 27, 33, 34, 48

Whalen v. United States, 445 U.S. 684 (1980)..... 45-46

Williams v. Oklahoma, 358 U.S. 576 (1959).....28, 29, 30

Williams v. United States, 112 S. Ct. 1112 (1992)...15, 35

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....1, 41

STATUTES

18 U.S.C. § 2.....5, 10, 23

18 U.S.C. § 3553.....1, 15, 43

18 U.S.C. § 3624..... 15

21 U.S.C. § 841.....12, 21, 24, 27, 44

21 U.S.C. § 841(a)(1).....5, 23, 27

21 U.S.C. § 841(b)(1)(B).....5, 21

21 U.S.C. § 846.....5, 7, 21, 23, 27, 44, 45

21 U.S.C. § 952.....21, 44

21 U.S.C. § 952(a)..... 10

21 U.S.C. § 960.....12, 21, 24, 27, 44

21 U.S.C. § 960(b)(2)(B)..... 10

21 U.S.C. § 963..... 10, 21, 44, 45

28 U.S.C. § 991..... 15

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 994 ..... 15, 43

28 U.S.C. § 995(a) 15

28 U.S.C. § 1254(1) 1

SENTENCING GUIDELINES

U.S.S.G. Ch. 1, Pt. A.3 ..... 15, 22

U.S.S.G. Ch. 1, Pt. A.4 ..... 15, 16, 17, 24

U.S.S.G. § 1B1.1 ..... 18, 23, 36, 43

U.S.S.G. § 1B1.2 18

U.S.S.G. § 1B1.3 ..... *passim*

U.S.S.G. § 2A1.1 30

U.S.S.G. § 2A4.1 30

U.S.S.G. § 2D1.1 ..... *passim*

U.S.S.G. § 2D1.4 7

U.S.S.G. § 3C1.1 31

U.S.S.G. Ch. 3, Pt. D 22, 27

U.S.S.G. § 3D1.2 ..... *passim*

U.S.S.G. § 3D1.3 ..... 21, 24

U.S.S.G. § 4A1.2 31

U.S.S.G. Ch. 5, Pt. A – Sentencing Table 9, 18

U.S.S.G. § 5G1.2 ..... 24, 47

U.S.S.G. § 5G1.3 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S.S.G. § 5K1.1 ..... 5, 8

U.S.S.G. App. A – Statutory Index 21

LAW REVIEW ARTICLES

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 15, 16, 17, 21, 22, 27

William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990) 18

David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993) 17, 18, 29

MISCELLANEOUS

Random House Dictionary of the English Language (2d ed. unabridged 1987) 36, 37

OPINIONS BELOW

The opinion of the court of appeals (J.A. 137) is reported at 25 F.3d 250 (5th Cir. 1994). The order of the district court (J.A. 130) is not reported.

JURISDICTION

The decision of the court of appeals (J.A. 137) was announced on June 23, 1994. The petition for certiorari was filed on September 21, 1994. Certiorari was granted on January 6, 1995. (J.A. 167). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.

U.S. Const. amend. V.

STATUTORY PROVISIONS INVOLVED

The text of 18 U.S.C. § 3553 is reprinted in the Appendix to this brief beginning at page A-1.

GUIDELINES PROVISIONS INVOLVED

The text of U.S.S.G. § 1B1.3 is reprinted in the Appendix to this brief beginning at page B-1.

The text of U.S.S.G. § 3D1.2 is reprinted in the Appendix to this brief beginning at page C-1.

The text of U.S.S.G. § 5G1.3 is reprinted in the Appendix to this brief beginning at page D-1.

STATEMENT

A. Offense Conduct[1]

In August 1989, an undercover agent of the Drug Enforcement Administration (DEA), Roger Norman, began negotiations with Dennis Mason in Tucson, Arizona, to import 1,000 kilograms of marijuana from Mexico to Houston, Texas. After Mr. Mason failed to provide the down payment, Agent Norman departed Tucson.

The DEA reactivated the case on June 9, 1990. On that date, Mr. Mason and Steven Kurt Witte, the Petitioner, met with federal undercover agents in Houston, Texas. The parties negotiated the transportation of fifteen tons of marijuana from Mexico to the United States. The undercover agents were to provide a DC-3 aircraft and a smaller airplane to transport the marijuana. Mr. Mason agreed to pay $165.00 for the transportation of each kilogram, and he and Mr. Witte agreed to provide $30,000 in expenses. Mr. Witte agreed to buy a horse trailer that could hold 2,000 pounds of marijuana. Later that day, Mr. Mason gave $30,000 to an undercover agent at Houston Intercontinental Airport prior to Mr. Mason's and a confidential informant's departure to Mexico via Tucson, Arizona.

On June 15, 1990, Mr. Mason and the confidential informant checked into a hotel in Tucson, Arizona, and later purchased a used automobile so that they could drive into Mexico. On June 20, 1990, they met Tom Pokorny in Tucson, and they all departed for Mexico.

On the morning of June 27, 1990, the DEA installed electronic surveillance equipment in a room at a hotel in

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[1] The facts summarized in this section are found in paragraphs 5 through 27 of the Presentence Report in *United States v. Kurt Steven Wittie [sic]*, Cr. No. H-91-033, unless otherwise stated.

Houston, Texas. Mr. Pokorny met with Agent Norman and a confidential informant in the room later that morning and told Agent Norman that he and Mr. Mason wanted the agent to fly to Guatemala and transport cocaine by airplane into the United States. Mr. Pokorny offered to pay Agent Norman $1,000 for each kilogram of cocaine that he transported. They later telephoned Mr. Mason in Mexico, and Mr. Mason told Agent Norman that he would prefer that the cocaine in Guatemala and the marijuana in Mexico be transported at the same time. Mr. Pokorny and Agent Norman then made arrangements to fly to Guatemala, and Mr. Pokorny gave the agent $5,000.

Negotiations continued on July 15, 1990, when Agent Norman, the confidential informant, and other federal agents met with Mr. Pokorny, Mr. Mason, and Mr. Witte at a hotel in Houston, Texas. The parties agreed to proceed with the transportation of marijuana out of Mexico or the transportation of cocaine out of Guatemala, whichever came first. They also discussed that the Mexicans might add cocaine to the marijuana shipment from Mexico.

On July 23, 1990, Mr. Pokorny gave Agent Norman $100,000 in expense money for the transportation of 4,400 pounds of marijuana out of Oaxaca, Mexico. On July 27, 1990, Agent Norman learned the coordinates of the airstrip in Oaxaca. Mexican officials arrested Mr. Mason and four other individuals in Oaxaca, Mexico, on August 12, 1990, and seized 591 kilograms of cocaine. On August 13, 1990, federal agents and informants met with Mr. Witte and told him the pilots were unable to land because police had shown up at the airstrip.

Between August 13, 1990, and January 25, 1991, the DEA temporarily ceased contact with and surveillance of Mr. Witte and other suspects. On January 25, 1991, Agent

Norman paged Mr. Witte, and Mr. Witte telephoned him from Tucson, Arizona. Agent Norman offered to sell Mr. Witte 1,000 pounds of marijuana. Mr. Witte said he would call back the following Monday if he could raise the $50,000 down payment.

On January 28, 1991, Mr. Witte telephoned Agent Norman, stated that he had the down payment, and requested the return of his horse trailer so that it could be used as a load vehicle. Mr. Witte also said he would use a motor home as a second load vehicle. After two subsequent phone calls with Agent Norman, Mr. Witte met him in Houston, Texas, on February 7, 1991.

During the meeting on the evening of February 7, 1991, Mr. Witte told Agent Norman that he had only $25,000. Agent Norman agreed to give Mr. Witte the marijuana and to allow him three days to pay the balance. Later, in the early morning of February 8, 1991, Agent Norman telephoned other agents and directed them to come pick up the mobile home, which was to be used as the second load vehicle. The agents arrived at a restaurant, Mr. Witte showed them where the hidden compartments were located, and the agents drove the mobile home away.

Later in the morning of February 8, 1991, Agent Norman and another agent met Mr. Witte and Sam Kelly at their hotel. Mr. Witte introduced Mr. Kelly as the driver of the mobile home. The agents and Mr. Kelly went to a mall where the mobile home and horse trailer, which contained the marijuana, had been parked. The agents arrested Mr. Kelly when he took possession of the mobile home and horse trailer, and arrested Mr. Witte in the parking lot of his hotel.

B. United States v. Witte and Kelly, Cr. No. H-91-033[2]

On February 11, 1991, Mr. Witte and Mr. Kelly were charged by criminal complaint with conspiring to possess with intent to distribute more than 100 kilograms of marijuana on or about February 8, 1991, in violation of 21 U.S.C. §§ 841(a)(1), 846. (J.A. 3). The complaint alleged that the charges were based on the facts in the attached affidavit. *Id.* The affidavit alleged in summary form the offense conduct described above, *see supra* text, at 2-4, which had occurred from June 9, 1990, through February 8, 1991. (J.A. 4-8).

On March 4, 1991, Mr. Witte and Mr. Kelly were charged in a two-count indictment with conspiring to possess with intent to distribute in excess of 100 kilograms of marijuana and with attempting to possess with intent to distribute in excess of 100 kilograms of marijuana, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846. (J.A. 9-10). On February 21, 1992, Mr. Witte entered a plea of guilty to the attempted possession charge, Count Two of the indictment. (J.A. 39, 43).

The guilty plea was entered pursuant to a plea agreement in which Mr. Witte promised to cooperate "with the Government by providing truthful and complete information concerning this and all other offenses about which [he] might be questioned by law enforcement agents" and by testifying if called upon to do so. (J.A. 14). The Government agreed to move for a downward departure under U.S.S.G. § 5K1.1 if Mr. Witte provided substantial assistance, (J.A. 14), and to recommend a three-year cap if Mr. Witte assisted in locating Mr. Pokorny. (J.A. 21, 23).

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[2] Hereinafter referred to as "Case No. 91-033." "Wittie" is corrected to "Witte."

The Government further agreed to move to dismiss Count One at sentencing. (J.A. 14, 34).

The parties stipulated that the amount of marijuana possessed by Mr. Witte was 375 pounds. (J.A. 17, 41, 59). At the plea proceeding, defense counsel expressed his view that the presentence report should not include as relevant conduct the cocaine in Oaxaca, Mexico, and related matters since the Government had contended all along that the "previous case" had nothing to do with this case. (J.A. 18). The court responded that it was not bound by "what the probation officer finds out," that the Government could agree to a "downward departure to the amount actually possessed," and that, if it sentenced Mr. Witte on the basis of "350 pounds" rather than "1,000 pounds," the Government could appeal. (J.A. 18-19). At the end of the proceeding, the district court allowed Mr. Witte to remain free on bond pending sentencing. (J.A. 43).

Prior to sentencing, a United States Probation Officer prepared a presentence report ("PSR"). Under the section entitled "Offense Conduct," the PSR recited all of the activities of Mr. Pokorny, Mr. Mason, and Mr. Witte concerning marijuana and cocaine from August 18, 1989, through February 8, 1991. *See PSR*, paras. 5-27; *see also supra* text, at 2-4. At the end of the section, the PSR concluded, among other things, that the July 15, 1990, meeting between federal agents and Mr. Pokorny, Mr. Mason, and Mr. Witte "set out the infrastructure of the conspiracy" between them, that they were cohesive as a group, and that the federal agents "temporarily ceased contact with [Mr.] Witte until January 25, 1990 [*sic*], at which time Special Agent Norman and [Mr.] Witte resumed business." *PSR*, paras. 28-30. The addendum to the PSR further concluded that Mr. Witte "is held accountable for the entire drug amount involved in the

jointly undertaken criminal activities" of himself, Mr. Pokorny, Mr. Mason, and Mr. Kelly, because these activities were reasonably foreseeable to Mr. Witte, were jointly undertaken by him, and were within the scope of his agreement. *Addendum to the PSR*, at 1 (citing U.S.S.G. § 1B1.3).

Under the section entitled "Offense Level Computation," the PSR first calculated the base offense level for Mr. Witte's offense, which was described in the following manner:

> The guideline for 21 USC 846 is found in U.S.S.G. § 2D1.4 which refers to 2D1.1(a)(3). The *instant offense* involved aiding and abetting in an attempt to possess with intent to deliver 15 tons of marijuana from Mexico, 500 kilograms of cocaine from Guatemala, 591 kilograms of cocaine from Mexico and a marijuana reverse buy involving 1,000 pounds of marijuana in Houston, Texas.

PSR, para. 35 (emphasis added). The PSR next converted the amount of cocaine into an equivalent of marijuana, arrived at an aggregate drug amount of 232,261.6 kilograms of marijuana, and concluded that Mr. Witte's base offense level was 40. *PSR*, para. 35.

To the base offense level, the PSR added a two-level adjustment for Mr. Witte's role in "the 1,000-pound marijuana delivery and the 15-ton marijuana negotiations." *PSR*, para. 37. It denied him a two-level downward adjustment for acceptance of responsibility because he acknowledged his involvement "in the *instant offense* for events that occurred only after January 25, 1991." *PSR*, para. 41 (emphasis added). Based on these calculations, the PSR concluded that Mr. Witte's total offense level was 42. Because Mr. Witte's criminal history category was I, *PSR*, para. 45, his imprisonment range, according to the PSR, was 360 months to life. *PSR*, para. 69.

At sentencing on July 10, 1992, both Mr. Witte and the Government asked the court for a two-level reduction in the total offense level for acceptance of responsibility. (J.A. 54-55, 59-60). Both parties also objected to the aggregate drug amount in paragraph 35 of the PSR on the ground that the case involved only negotiations on 1,000 pounds of marijuana and the delivery of 375 pounds of marijuana to the defendants. (J.A. 54-57, 60-62, 63-65). The district court well understood the import of the arguments under the Double Jeopardy Clause as it addressed Mr. Witte:

> Do you know that both your lawyer and the Government's lawyer are trying to convince me to disregard all of the talk about anything except this particular little marijuana deal, but for different reasons? Your lawyer wants me to disregard it so that I'll reduce your sentence in this case. The Government's lawyer wants me to disregard it so he can indict you in another case if he wants to.

(J.A. 62).

Prior to sentencing, the Government moved the court for a downward departure under U.S.S.G. § 5K1.1 on the basis of Mr. Witte's substantial assistance. (J.A. 57-58). The Government stated that the motion had nothing to do with other matters that were pending or "may be pending in this or any other jurisdiction" and that it only had "to do with this particular case." (J.A. 57-61). The district court granted the Government's motion for a downward departure. (J.A. 58).

Ultimately, the court granted Mr. Witte a two-level reduction for acceptance of responsibility, which reduced his total offense level to 40 and his imprisonment range

to 292 to 365 months. (J.A. 68).[3] The court then sentenced Mr. Witte to serve 144 months in custody and imposed a five-year term of supervised release and a fifty-dollar special assessment. (J.A. 68-69, 74-81). Noting the thorough job of the probation officer and the mandate of the Sentencing Reform Act, the court adopted the factual statements and the relevant conduct in the PSR. (J.A. 68-69). The district court dismissed Count One of the indictment. (J.A. 69).

Mr. Witte timely filed a notice of appeal on July 10, 1992, but his appeal was dismissed on December 16, 1992, for his failure to file a brief. (J.A. 2).

C. United States v. Witte and Pokorny, Cr. No. H-92-207[4]

Although Mr. Pokorny had remained at large since August 12, 1990, *see PSR*, paras. 17, 32, he was apprehended in June of 1992, prior to Mr. Witte's sentencing in Case No. 91-033. *See* Order of Detention Pending Trial, at 3, *United States v. Pokorny*, Cr. No. H-92-207 (S.D. Tex.

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[3] For 375 pounds (approximately 170 kilograms) of marijuana, the base offense level would have been 26. *See* U.S.S.G. § 2D1.1(c)(7) (100 to 400 kilograms of marijuana). For 1,000 pounds (approximately 455 kilograms) of marijuana, the base offense level would have been 28. *See id.* § 2D1.1(c)(6) (400 to 700 kilograms of marijuana). Because the two-level reduction for acceptance of responsibility and the two-level addition for role in the offense cancel out, the total offense level in this case, as urged by the parties, would have been 26 or 28. Prior to the court's departure downward, therefore, the imprisonment range would have been 63 to 78 months (level 26) or 78 to 97 months (level 28). *See* U.S.S.G. Ch. 5, Pt. A – Sentencing Table (criminal history category I, offense levels 26 and 28).

[4] Hereinafter referred to as "Case No. 92-207." "Wittie" is corrected to "Witte."

filed Nov. 23, 1992) (docket entry 12). On September 2, 1992, Mr. Witte and Mr. Pokorny were charged in a two-count indictment with conspiring to import in excess of five kilograms of cocaine and attempting to import in excess of five kilograms of cocaine from August 18, 1989, through August 15, 1990, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 952(a), 960(b)(2)(B), 963. (J.A. 82-83). The case was assigned to a different district judge of the same court. *Compare* (J.A. 45), *with* (J.A. 84).

On February 22, 1992, the district court held a hearing on Mr. Witte's motion to dismiss the indictment for violation of the Double Jeopardy Clause and breach of the plea agreement entered into in Case No. 91-033. (J.A. 84-129). The Government's description of the cocaine offenses charged in Case No. 92-207 was virtually identical to the offense conduct that had been included in Mr. Witte's base offense level in Case No. 91-033. *Compare PSR*, paras. 5-27, 35, *with* (J.A. 85-88). Subsequent to the hearing, the district court entered an order dismissing the indictment because it violated the Double Jeopardy Clause's protection against multiple punishments for the same offense. (J.A. 130-36).

The Government appealed the ruling, and the United States Court of Appeals for the Fifth Circuit reversed the order of the district court on June 23, 1994. *United States v. Wittie*, 25 F.3d 250, 254-62, 263 (5th Cir. 1994); (J.A. 143-62, 166). The Fifth Circuit held, *inter alia*, that the inclusion of the cocaine in relevant conduct in Case No. 91-033, even if considered punishment under the Double Jeopardy Clause, did not bar double and additional punishment of Mr. Witte in Case No. 92-207 because Congress had

authorized this result under U.S.S.G. § 5G1.3(b).[5] *Wittie*, 25 F.3d at 258-61; (J.A. 154-62).

This Court granted certiorari on January 6, 1995. (J.A. 167).

SUMMARY OF ARGUMENT

I. The United States Sentencing Guidelines mandate the punishment of drug offenders for all real offenses in one proceeding, and Mr. Witte was punished for all real offenses in Case No. 91-033.

A. In carrying out the mandate of Congress, the United States Sentencing Commission adopted modified real offense sentencing, which punishes a defendant for all real offenses. The Commission crafted the guidelines to eliminate unfair treatment from count manipulation and to punish the total harm when offenses involve fungible items such as separate drug transactions. The federal guidelines' version of real offense sentencing is unprecedented in prior state or federal practice, especially because it is mandatory and punishes alleged related offenses in addition to the offense charged.

B. The relevant conduct provisions of the guidelines expressly hold offenders accountable for all charged and uncharged real offenses. Section 1B1.3 and its commentary define "offense" as "the offense of conviction and all relevant conduct," and specifically include in relevant

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[5] According to the Fifth Circuit's example, if Mr. Witte had served 30 months of his sentence in Case No. 91-033 and were sentenced to 292 months in custody in Case No. 92-207, the district court would subtract the 30 months from the 292 months and impose a sentence of 262 months of imprisonment pursuant to U.S.S.G. § 5G1.3(b). *See Wittie*, 25 F.3d at 261; (J.A. 162). Accordingly, the Fifth Circuit concluded that the district court could impose an additional 118 months (262-144) of imprisonment in Case No. 92-207.

conduct all acts and omissions aided and abetted by the defendant and all jointly undertaken criminal activity, "whether or not charged as a conspiracy."

C. The guidelines employ a strong version of real offense sentencing for drug offenses and significantly minimize any element of charge offense sentencing. Section 3D1.2(d) requires that drug offenses be grouped based on the total quantity of drugs involved in all real offenses. This punishes the offender as if there were only one count. Section 2D1.1 groups the total quantity of drugs to determine the base offense level. The commentary also specifically notes that violations of 21 U.S.C. §§ 841 and 960 receive identical punishment. The guidelines' punishment of drug offenders for all real offenses in one proceeding promotes uniformity in sentencing and efficient judicial administration.

D. Pursuant to the real offense sentencing structure of the guidelines, Mr. Witte was punished for all real offenses in Case No. 91-033 and received a procedurally complete and final sentence for those offenses. The base offense level was pegged to a drug conspiracy offense and thus the calculation of punishment did not even begin with the offense to which he pleaded guilty. All real offenses were grouped based on the total amount of drugs, and the court sentenced Mr. Witte for those offenses because they were jointly undertaken and were part of the same course of conduct. Mr. Witte would have faced no different base offense level or range of punishment even if he had pleaded guilty to all real offenses. Thus, the operation of the guidelines at Mr. Witte's sentencing leaves no room for the argument that he was not punished for all real offenses or that his punishment was merely "enhanced" by them.

II. The Double Jeopardy Clause bars punishing Mr. Witte again for the offenses for which he already has been punished.

A. When multiple punishments are imposed in a single proceeding, the Double Jeopardy Clause ensures that a court does not exceed its legislative authorization. When the Government seeks to impose additional punishment in a second proceeding, however, the Double Jeopardy Clause bars such a result. *See United States v. Halper*, 490 U.S. 435, 451 n.10 (1989). The Fifth Circuit assumed that both prosecutions involved the "same offense" and that Mr. Witte previously had been punished for the cocaine offenses. Misinterpreting this Court's single-proceeding precedent, the Fifth Circuit ruled that Mr. Witte could be punished again for those offenses in a second proceeding because that was authorized under U.S.S.G. § 5G1.3(b). Because the posture of the case in the court below embodied the assumption that both prosecutions involved the "same offense," the Fifth Circuit's conclusion clearly was constitutionally wrong under *Halper*. The Fifth Circuit's misinterpretation of precedent also caused it to read section 5G1.3(b) as authorizing violations of the Double Jeopardy Clause.

B. Congress has incorporated the guidelines into the federal criminal code, and a federal court cannot ignore that mandate of Congress and the express language of the guidelines in determining whether a defendant is being twice punished in separate proceedings for the same offense. Just as the trial court's order of release in *United States v. Dixon*, 113 S. Ct. 2849 (1993), incorporated the entire criminal code, so too has Congress incorporated the guidelines into each provision of the federal criminal code. Thus, to determine whether the offenses punished in two separate proceedings are the same, a

federal court must look to the offenses punished pursuant to the guidelines. If the offenses are the same in both proceedings, the Double Jeopardy Clause bars additional punishment.

C. Punishing Mr. Witte again in Case No. 92-207 is punishing him twice for the same offenses in violation of the Double Jeopardy Clause. The base offense level and the relevant conduct will necessarily be the same as in the prior prosecution, and Mr. Witte will face an additional 191 months in prison. Mr. Witte will be punished for the same conspiracy and for the same attempted importation and possession of cocaine and marijuana. The Double Jeopardy Clause, therefore, prohibits any additional punishment.

ARGUMENT

I. THE UNITED STATES SENTENCING GUIDELINES MANDATE THE PUNISHMENT OF DRUG OFFENDERS FOR ALL REAL OFFENSES IN ONE PROCEEDING, AND MR. WITTE WAS PUNISHED FOR ALL REAL OFFENSES IN CASE NO. 91-033.

A. The Sentencing Guidelines Implement Mandatory Modified Real Offense Sentencing to Effectuate the Goals of Uniformity and Proportionality and to Preclude the Danger of Charge Manipulation.

"The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States*, 501 U.S. 129, 132 (1991). Prior to the implementation of the United States Sentencing Guidelines,[6] "[s]tatutes specified the penalties for crimes but nearly always gave the

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[6] United States Sentencing Comm'n, *Guidelines Manual* (Nov. 1994) [hereinafter referred to as "the guidelines" and cited as "U.S.S.G."].

sentencing judge wide discretion to decide" the nature and length of the punishment imposed. *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

The Sentencing Reform Act mandated a number of reforms in order to change this approach, including: (1) it made all sentences determinate; and (2) it made "the Sentencing Commission's guidelines binding on the courts, although it preserved some discretion for the judge to depart from the guideline applicable in a particular case." *Id.* at 367-68 (citing 18 U.S.C. §§ 3553(a), (b), (c), 3624(a), (b), and 28 U.S.C. §§ 991, 994, 995(a)).[7]

Congress sought to achieve three objectives in enacting the Sentencing Reform Act: (1) honesty in sentencing, through the imposition of determinate sentences; (2) uniformity in sentencing "by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders;" and (3) "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G. Ch. 1, Pt. A.3; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 Hofstra L. Rev. 1, 4-6 (1988) (discussing purposes of Congress).

In drafting the guidelines, the Sentencing Commission was required to resolve "a host of important policy questions" involving competing considerations. U.S.S.G. Ch. 1, Pt. A.4; *see also* Breyer, *supra*, at 8-31 (discussing six kinds of compromises forced upon the Commission). One

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[7] In fact, the guidelines and their attendant commentary and policy statements also are binding and authoritative. *See Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993) (amended commentary binding); *Williams v. United States*, 112 S. Ct. 1112, 1119 (1992) (policy statements authoritative guide as to applicable guideline).

key policy question was the choice between real offense sentencing and charge offense sentencing:

> One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).

U.S.S.G. Ch. 1, Pt. A.4(a); *see also* Breyer, *supra*, at 8-12 (discussing the compromise between these competing rationales).

The "Commission initially sought to develop a pure real offense system," but subsequently moved closer to a charge offense system, while retaining "a significant number of real offense elements." U.S.S.G. Ch. 1, Pt. A.4(a). The Sentencing Guidelines, therefore, are a charge offense system to the extent that they look "to the offense *charged* to secure the 'base offense level.' " Breyer, *supra*, at 11-12 (footnote omitted; emphasis in original). The Commission, however, wrote "guidelines that are descriptive of generic conduct rather than guidelines that track pure statutory language" because of "the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law." U.S.S.G. Ch. 1, Pt. A.4(a).

As the Sentencing Commission expressly recognized, however, a charge offense system has its own drawbacks that call for special protections:

> One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. . . . [T]he Commission has written its rules for the treatment of multicount

> convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin . . . , the same as a single-count indictment charging the sale of 300 grams of heroin . . . .

Id. This same concern about charge manipulation also is reflected in the Commission's attempt to grapple with the issue of multi-count convictions in which conduct involves the same harm or "fungible items" such as "separate drug transactions." *Id.* Pt. A.4(e). When the conduct involves fungible items, "the amounts are added and the guidelines apply to the total amount." *Id.*

The modified real offense system adopted by the Sentencing Commission distinguishes the guidelines from prior federal and state sentencing practices. "The Sentencing Commission's decision to employ a strong version of mandatory real-offense sentencing, particularly its inclusion of alleged related-offense sentencing, is unprecedented in the history of American sentencing systems." David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 404-05 (1993) (footnote omitted); *see also id.* at 419. Although a judge in the former federal system exercised the discretion to consider real-offense elements in sentencing, a judge "was not *required* to take into account any real-offense behavior, as would be the case with binding sentencing guidelines incorporating real-offense sentencing." *Id.* at 418 (emphasis in original). Real offense sentencing under the old federal system was sporadic and unpredictable, and the weight given to real offense elements generally was hidden. *Id.* at 418-19. These features of the old system motivated the promulgation of the guidelines. *See id.* at 419; *see also* Breyer, *supra*,

at 11. Thus, the guidelines' version of real offense sentencing promotes uniformity and proportionality and guards against count manipulation in sentencing, but it also "is a radical measure," particularly because it incorporates mandatory sentencing for alleged related offenses. Yellen, *supra*, at 419.

B. The Relevant Conduct Provisions of the Guidelines Expressly Implement the Intent to Hold Offenders Accountable for All Charged and Uncharged Real Offenses in One Proceeding.

The language and directives of the guidelines themselves specifically implement a strong version of real offense sentencing. In general, the guidelines direct a sentencing judge to take the following steps in imposing a federal sentence: (1) look up the statute of conviction in the statutory index; (2) find the base offense level; (3) add specific offense characteristics; (4) add any adjustments from Chapter 3; (5) calculate a criminal history score using Chapter 4; (6) look at the Sentencing Table in Chapter 5 to determine the sentence; and (7) impose a guideline sentence, or, if the court finds unusual factors, depart and impose a non-guideline sentence. Breyer, *supra*, at 6-7; *see also* U.S.S.G. § 1B1.1. The commentary to section 1B1.1 expressly states that "*[o]ffense* means the offense of conviction and *all relevant conduct* under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)) (emphasis added). Section 1B1.2 directs: "[a]fter determining the appropriate offense guideline section . . . , determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct)." *Id.* § 1B1.2(b). The relevant conduct section, therefore, "forms the cornerstone of the federal sentencing guideline system." William W. Wilkins, Jr. & John R. Steer,

Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 496 (1990).

Section 1B1.3 requires, in pertinent part, that:

> (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, *whether or not charged as a conspiracy*), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction.

U.S.S.G. § 1B1.3(a)(1)-(2) (emphasis added).

Thus, the Sentencing Guidelines expressly require that a defendant is to be held accountable for all jointly

undertaken criminal activity "whether or not charged as a conspiracy." *Id.* § 1B1.3(a)(1)(B); *see also id.* comment. (n.2). With respect to offenses involving controlled substances, the guidelines also direct a sentencing judge to hold the defendant accountable for all quantities of contraband with which he was directly involved and, in the case of jointly undertaken criminal activity, "all reasonably foreseeable quantities that were within the scope of the criminal activity that he jointly undertook." *Id.* comment. (n.2) (italics deleted). Offenses that would require grouping under the multiple-counts provisions of section 3D1.2(d) are treated in the same manner, and, again, the defendant need not "have been convicted of multiple counts." *Id.* comment. (n.3) (italics deleted).

C. The Guidelines and Commentary Regarding Drug Offenses Mandate the Punishment of Drug Offenders for All Real Offenses in One Proceeding and Protect Against Double Counting.

Thus, the Sentencing Commission through the relevant conduct provisions evinced an express desire to hold defendants accountable for their real offenses in a federal criminal case regardless of whether those offenses were charged or uncharged. The Commission's intent is especially pervasive in its treatment of drug offenses. Section 3D1.2 of the guidelines requires that all counts "shall be grouped" when "the offense level is determined largely on the basis of the total amount of . . . the quantity of substance involved, . . . or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." U.S.S.G. § 3D1.2(d). Subsection (d) specifically requires the grouping of offenses covered by section 2D1.1 and other drug offense guidelines. *Id.* § 3D1.2(d). The commentary also

makes clear that drug offenses are to be grouped and that the sentence is to be based on the total quantity. *See* U.S.S.G. § 3D1.2, comment. (n.4, ex.4), (n.6 & ex.5); *see also id.* § 3D1.3(b) & comment. (n.3). The grouping rules in drug cases are designed "to avoid double counting." *Id.* § 3D1.2, comment. (n.4, ex.4). In essence, they "punish the offender as if there were a single count involving the total amount." Breyer, *supra*, at 27.

The Statutory Index of the guidelines further reflects the Sentencing Commission's intent to hold defendants in federal drug cases accountable in one proceeding for their real offenses regardless of the charged offenses. For example, the statutes prohibiting possession with intent to distribute a controlled substance and importation of a controlled substance are assigned the same guideline, section 2D1.1. *See* U.S.S.G. App. A – Statutory Index (21 U.S.C. §§ 841(a), 841(b)(1)-(3), 952, 960(b)). Similarly, the statutes prohibiting conspiracy to possess with intent to distribute a controlled substance and conspiracy to import a controlled substance are assigned the same guidelines, including section 2D1.1. *See id.* (21 U.S.C. §§ 846, 963).

Finally, section 2D1.1 uses the aggregate quantity of drugs to assign a *base offense* level under the guidelines. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table); *see also id.* comment. (n.6). In the commentary, the Commission expressly notes that "[o]ffenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense." *Id.* comment. (backg'd.). Especially with regard to drug offenses, the guidelines significantly minimize, if they do not eliminate, charge offense sentencing.

The purposes, structure, and language of the guidelines, therefore, mandate the punishment of drug offenders for all real offenses in one sentencing proceeding, whether those offenses are charged or uncharged. This treatment of drug offenses comprises an elegant execution of the Sentencing Commission's objectives "to provide incremental punishment for significant criminal conduct," but not in a strictly proportionate manner, U.S.S.G. Ch. 3, Pt. D, intro. comment.; *see also* Breyer, *supra*, at 27, "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct." U.S.S.G. Ch.3, Pt. D, intro. comment.

The guidelines' treatment of drug offenses also embodies the sound policies of efficient judicial administration and fairness. For example, in a case similar to Mr. Witte's, in which the guideline imprisonment range is 292 to 365 months but there is no motion for a departure downward, a prosecutor could obtain at least four sentencings by four judges in the same federal courthouse for all of the same relevant conduct, were it not for the guidelines' strong real offense approach. *See PSR*, para. 35 (two marijuana transactions and two cocaine transactions). The prosecutor could obtain ever increasing punishment within the same guideline range (*e.g.*, 292, 310, 340, and 365 months) from four federal judges until he or she "rang the bell" at the top of the guideline range. In addition, four appeals and four petitions for writ of certiorari might well follow. This practice under a federal guideline system would beleaguer federal courthouses throughout the land and subvert the fairness of the sentencing process. It would fail not only to decrease disparity in sentencing similar offenders who had committed similar offenses, *see* U.S.S.G. Ch. 1, Pt. A.3, but it also would create disparity in the sentencing of just one

offender for all of the same offenses.[8] To avoid such consequences, the guidelines mandate the punishment of drug offenders for all real offenses in one proceeding.

D. Pursuant to the Guidelines, Mr. Witte Was Punished for All Real Offenses in Case No. 91-033 and Received a Procedurally Complete and Final Sentence for Those Offenses.

The PSR in Case No. 91-033 fulfilled all of the procedural steps required by the guidelines, except for the imposition of sentence. *See* U.S.S.G. § 1B1.1; *see also supra* text, at 7-8; *PSR*, paras. 1-69. It concluded that there was a "cohesive" conspiracy between Mr. Pokorny, Mr. Mason, and Mr. Witte, *PSR*, paras. 28-29, and that federal agents "temporarily ceased contact with [Mr.] Witt[e] until January 25, 199[1], at which time Special Agent Norman and [Mr.] Witt[e] resumed business." *PSR*, para. 30. Based on the facts and these conclusions, the PSR calculated the *base offense level* for *"the instant offense"* by using the guideline for 21 U.S.C. § 846, which proscribes drug conspiracies, even though Mr. Witte had entered a plea of guilty to Count Two of the indictment, which charged aiding and abetting and attempting to possess with intent to distribute a controlled substance, in violation of 18 U.S.C. § 2, and 21 U.S.C. § 841(a)(1). *Compare PSR*, para.

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[8] Worse yet would be the case in which the drug offenses and sentencings involved drug-trafficking negotiations only. *See* U.S.S.G. § 2D1.1, comment. (n.12) (amount under negotiation is used unless the court finds the defendant did not intend to or could not produce it). In such a case, a prosecutor via charging decisions could seek significant additional sentences for the same real offenses in multiple proceedings by pursuing ever increasing rulings from different judges on the amounts under negotiation and/or the amounts that the defendant intended to or could produce.

35, *with* (J.A. 9-10) (indictment); (J.A. 14) (plea agreement); and (J.A. 43) (plea of guilty to Count Two). The PSR aggregated all drug quantities for all offenses and arrived at a base offense level of 40 on the ground that Mr. Witte should be "held accountable for the entire drug amount involved in the jointly undertaken activities." *Addendum to the PSR*, at 1; *PSR*, para. 35. This conclusion rested on U.S.S.G. § 1B1.3. *Addendum to the PSR*, at 1.

The grouping of all drug offenses under the base offense level calculation was entirely consistent with the Sentencing Commission's intent to punish offenses involving the same harm or "fungible items," such as "separate drug transactions," to eliminate unfair treatment from count manipulation. U.S.S.G. Ch. 1, Pt. A.4(a), (e). In fact, section 3D1.2 expressly requires the grouping of drug offenses and other offenses involving "substantially the same harm." U.S.S.G. § 3D1.2; *see also id.* § 3D1.2(d).

In addition, the base offense level in Case No. 91-033 would have been 40 even if Mr. Witte had been charged with and pleaded guilty to four counts of conspiring to import, importing, conspiring to possess with intent to distribute, and possessing with intent to distribute controlled substances. *See* U.S.S.G. § 2D1.1(a)(3), (c) (drug quantity determines base offense level); *id.* § 2D1.1, comment. (n.6) (quantities are to be added); *id.* § 2D1.1, comment. (backg'd.) ("Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment") (italics deleted); *id.* §§ 3D1.2, 3D1.3 (group multiple counts); *id.* § 5G1.2(b), (c) (impose total punishment on each count and run concurrently). Thus, with the rulings made by the trial court at sentencing, (J.A. 68-69), the imprisonment range still would have been 292 to 365 months, whether Mr. Witte pleaded guilty to all of the offenses or just one of them.

At sentencing, both Mr. Witte and the Government objected to the PSR's inclusion in the base offense level of any drug quantities or offenses other than the marijuana offense involving 375 or 1,000 pounds of the substance. (J.A. 54-57, 60-62, 63-65). The Government specifically objected to the inclusion of the other offenses and drug quantities on the ground that the PSR's calculation was in error because the offenses grouped were "separate agreements and separate offenses." (J.A. 61). The argument was aimed at section 1B1.3's requirement of a "common course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Having heard the arguments of the parties, the district court found that the facts in the PSR were true and that the relevant conduct was "relevant conduct related to the charge to which [Mr. Witte] pleaded guilty." (J.A. 68-69). To the extent that this was insufficient to overrule the Government's or Mr. Witte's specific objections, the district court explicitly stated that "other objections, if any, are overruled." (J.A. 69).

Mr. Witte stood before the district court at sentencing, therefore, exposed to 292 to 365 months of imprisonment for all offenses and the entire course of conduct in which he had participated, or otherwise joined. The guidelines, as found by the district court, mandated this result. (J.A. 68) (probation officer's job in analyzing facts was "what the Sentencing Reform Act requires").

When the Government moved the district court for a departure downward, it did not limit its request to a specific number of levels or number of months, but instead made the motion "without any recommendation on sentence" on the basis of Mr. Witte's having been debriefed. (J.A. 57). The Government, therefore, authorized the district court to exercise its discretion to depart downward by any number of levels or months on the

basis of its assessment of Mr. Witte's cooperation. If the court felt that Mr. Witte's assistance was substantial, it was free to subtract from the imprisonment range, as calculated, the entire sentence that would have been imposed on the *charged* marijuana offense only. *See supra* text, at 9 n.3 (63 to 78 months or 78 to 97 months). If the court believed that Mr. Witte's assistance was outstanding, it was free to subtract from the imprisonment range additional months that would have been imposed on the cocaine and other offenses only. In other words, the Government did not tell the court that it could not depart downward by more than 78 or 97 months on the ground that this would result in a reduction of the punishment for the cocaine offense, which the Government had contended was not part of the marijuana offense.

More significantly, when the court departed downward by 148 months from the 292-month minimum of the range and sentenced Mr. Witte to 144 months in custody, the Government did not object on the ground that the court had reduced Mr. Witte's sentence by more than was authorized by the Government's motion on the so-called marijuana offense. (J.A. 68-69). Had the Government appealed the court's action, it would have found itself in a posture of asserting plain error. *See United States v. Olano*, 113 S. Ct. 1770, 1774-75 (1993). The Government did not appeal, however, but instead obtained an indictment in Case No. 92-207 on the cocaine offense.

The foregoing analysis demonstrates that, pursuant to the guidelines, Mr. Witte was punished for all real offenses in Case No. 91-033 and received a procedurally complete and final sentence for those offenses. It further demonstrates that the punishment imposed for the cocaine offenses was not merely an "enhancement" to the punishment for the charged offense, as the Government

argued in the court below. *See Wittie*, 25 F.3d at 257; (J.A. 151). First, the base offense level was pegged to a violation of 21 U.S.C. § 846, the drug conspiracy offense, not to the violation of 21 U.S.C. § 841(a)(1), to which Mr. Witte entered a plea of guilty. Thus, the calculation of punishment did not even begin with the offense to which Mr. Witte pleaded guilty.

Second, all real offenses were grouped and quantified, and the aggregate drug amount resulted in a base offense level of 40, because the real offenses were all part of Mr. Witte's jointly undertaken activity. Rejecting the Government's argument, the court sentenced Mr. Witte on all offenses as quantified, finding that they were jointly undertaken and part of the same course of conduct or scheme. In this regard, the charged offense was not distinguished.

Third, Mr. Witte would have faced no different base offense level or range of punishment had he been charged with and pleaded guilty to all offenses. Especially with regard to drug offenses, the guidelines mandate this result whether or not the jointly undertaken activity is "charged as a conspiracy" and whether or not the defendant "has been convicted of multiple counts." U.S.S.G. § 1B1.3(a)(1)(B); *id.* comment. (nn.2 & 3). This result also avoids "double counting," punishes "the offender as if there were a single count involving the total amount," "limit[s] the significance of the formal charging decision and . . . prevent[s] multiple punishment for substantially identical offense conduct." U.S.S.G. § 3D1.2, comment. (n.4, ex.4); *id.* Ch. 3, Pt. D, intro. comment.; Breyer, *supra*, at 27. The guidelines further specifically state that offenses "under 21 U.S.C. §§ 841 and 960 receive identical punishment." U.S.S.G. § 2D1.1, comment. (backg'd.). Thus, the express language and intent of the guidelines

rebut any suggested distinction between a charged drug offense and other drug offenses used to calculate the base offense level.

Finally, although Mr. Witte's final sentence of 144 months did not include all punishment that he might have received for the cocaine transactions, the sentence did not result from any failure to hold him accountable for all drug transactions or to subject him to punishment for them. That Mr. Witte received a sentence below that attributable to the cocaine transactions resulted from the Government's failure to clearly inform the district court of the result it wanted, if it did want that, and its failure to object to a departure downward to a sentence of 144 months as contrary to the discretion it seemingly accorded to the district court.

Thus, Mr. Witte was punished in Case No. 91-033 for the cocaine offenses in accordance with the substantive and procedural requirements of the guidelines. The language, purposes, and function of the guidelines leave no room for the argument that Mr. Witte was not punished in Case No. 91-033 for the cocaine offenses indicted in Case No. 92-207 on the ground that the base offense level for the offense charged in Case No. 91-033 was merely "enhanced" by the offenses later charged in Case No. 92-207.

Nor do *Williams v. Oklahoma*, 358 U.S. 576 (1959), or other pre- or post-guideline enhancement cases show the contrary. On the facts of *Williams*, this Court held that a state court had not "punished petitioner a second time for the same offense" when it considered the fact that the petitioner had murdered his kidnapping victim, and it imposed a sentence of death for the kidnapping, even though the petitioner previously had been sentenced by a different state court to life in prison for the murder.

Williams, 358 U.S. at 586. This Court further found that "the sentencing judge is authorized, if not required to consider, all mitigating and aggravating circumstances involved in the crime." *Id.* at 585. The basis of the Court's holding in part was that the prior charge of murder to which the petitioner had pleaded guilty had made no "reference to the crime of kidnapping, and the charge of kidnapping involved in this case made no reference to murder." *Id.* at 585.

For a number of reasons, *Williams* does not show that Mr. Witte's sentence in Case No. 91-033 was merely enhanced under the federal guidelines and that he thus was not punished for the cocaine offenses in that case. First, a judge such as the one in *Williams* "was not *required* to take into account any real offense behavior, as would be the case with binding sentencing guidelines incorporating real-offense sentencing." Yellen, *supra*, at 418 (emphasis in original). Second, real offense sentencing such as in *Williams* was "sporadic and unpredictable" and the weight given to real offense elements was hidden. *Id.* at 418-19. Thus, there was no way for an appellate court to discern for what offense a defendant had been punished except by reference to the crime charged. *See infra* text, at Section II.B. (discussing the *Blockburger* test pre- and post-guidelines). In Mr. Witte's case, however, as in all guideline drug cases, the sentencing court does not merely "consider" an uncharged drug offense and give it some hidden weight, the court quantifies all related drug offenses and arrives at a base offense level that punishes them. This result is mandatory. *See, e.g., United States v. Colon*, 905 F.2d 580, 586-87 (2d Cir. 1990) (additional drugs must be incorporated into base offense level), *remanded for resentencing, sentence aff'd* 961 F.2d 41 (2d Cir. 1992).

Third, *Williams* rests on the premise that the murder charge and the kidnapping charge did not reference each other. *Williams*, 358 U.S. at 585. As explained below in Section II.B., however, Congress has incorporated the guidelines into the federal criminal code, and the guidelines not only cross-reference drug offenses, but also punish them together in the base offense level. *See infra* text, at 41-47. In fact, had *Williams* been a federal guidelines case, his punishment in the *kidnapping case* would have been the mandatory punishment for murder because of the express cross-reference in the kidnapping guideline to the murder guideline. *See* U.S.S.G. § 2A4.1(c) (requiring application of § 2A1.1 (First Degree Murder)). Thus, the premise of *Williams* is undercut by the guidelines.

To find, as the Fifth Circuit found, that the guidelines do "not change the analysis of the punishment issue in *Williams*," *Wittie*, 25 F.3d at 258; (J.A. 154), overlooks the mandatory real offense sentencing system promulgated by the guidelines. The point is not that *Williams* was wrong or must be overruled, but is that *Williams* was decided before the advent of the guidelines on the basis of sentencing practices that did not mandate specific rules of punishment. *Williams*, therefore, does not control this case. Nor do other similar pre-guidelines cases. *See, e.g., Sekou v. Blackburn*, 796 F.2d 108, 111-12 (5th Cir. 1986) (discussing *consideration* of other crimes).

Cases regarding the punishment of a defendant on the basis of prior criminal history also do not advance the analysis in this case. *See, e.g., Nichols v. United States*, 114 S. Ct. 1921, 1927-28 (1994). The guidelines specifically address criminal history in a measure distinct from the base offense level. *See* U.S.S.G. Ch. 4. If the guidelines' treatment of criminal history shows anything with regard

to this case, it shows that the criminal history of a defendant is not increased unless a prior sentence was imposed "for conduct [that was] *not* part of the instant offense." U.S.S.G. § 4A1.2(a)(1) (emphasis added). By analogy, this supports Mr. Witte's position.

Finally, this case is not one in which the sentencing court merely "adjusted" a defendant's total offense level by two points due to some aspect of the offense or proceeding not taken into account by the base offense level and in which the defendant later was prosecuted. *See, e.g., United States v. Duarte*, 28 F.3d 47, 48-49 (7th Cir. 1994). The guidelines themselves distinguish between the base offense level on the one hand, and specific offense characteristics and adjustments on the other hand. If a defendant, for example, received a two-level "adjustment," *see* U.S.S.G. Ch. 3 ("Adjustments"), to his drug offense sentence for obstruction of justice, *see id.* § 3C1.1, one possibly could argue that he initially had not been sentenced and punished to the full extent under the specific guideline for the offense of threatening a witness, but merely had received an enhancement for his conduct during the drug prosecution. *Duarte*, 28 F.3d at 48.

Nevertheless, that is not the case before this Court, and the Court need not decide that issue. In Mr. Witte's case, his base offense level and guideline range included all drug offenses and all drug quantities for which he could be punished under federal statutes and the guidelines. As shown above, he was punished for those offenses in Case No. 91-033 in accordance with the procedural and substantive requirements of the guidelines, and he received a procedurally complete and final sentence.

II. THE DOUBLE JEOPARDY CLAUSE BARS PUNISHING MR. WITTE AGAIN FOR OFFENSES FOR WHICH HE ALREADY HAS BEEN PUNISHED.

A. Congress Cannot Authorize the Imposition of Cumulative Punishment for One Offense in Two Criminal Proceedings, and the Fifth Circuit Thus Erred.

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing *Pearce v. North Carolina*, 395 U.S. 711, 717 (1969)). "The third of these protections . . . has deep roots in our history and jurisprudence." *Halper*, 490 U.S. at 440. The constitutional proscription against multiple punishments safeguards " 'humane interests,' " and the protection "is intrinsically personal." *Id.* at 447 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

When cumulative punishments are imposed at a single proceeding, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983). Nevertheless:

> [W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.

Halper, 490 U.S. at 451 n.10; *see also Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994); *United States v. Dixon*, 113 S. Ct. 2849, 2857 (1993) (White, J., concurring in part and dissenting in part).

On the basis of these principles, this Court recently held that the assessment of a drug tax in a second proceeding for possession and storage of marijuana after conviction and punishment for the criminal offense violated the protection of the Double Jeopardy Clause against multiple punishments. *Kurth Ranch*, 114 S. Ct. at 1948. As the Court recognized, "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, if it had assessed the tax in the same proceeding." *Id.* at 1945. Nevertheless, because the tax was punitive, the Double Jeopardy Clause required that it had to be "imposed during the first prosecution or not at all." *Id.* at 1948. The Court also found it "significant that the same sovereign that criminalized the activity also imposed the tax." *Id.* at 1947 n.22; *see also Dixon*, 113 S. Ct. at 2871-72 (White, J., concurring in part and dissenting in part) (discussing *Grafton v. United States*, 206 U.S. 333 (1907)). Similarly, in *Halper*, the Court struck down a civil penalty sought in a second proceeding after the defendant had been criminally convicted in a prior proceeding because, although legislative intent is the touchstone of whether multiple punishments can be imposed in one proceeding, the Double Jeopardy Clause bars multiple punishments for the same offense in two separate proceedings. *Halper*, 490 U.S. at 450-51 & n.10.

In its analysis, the Court of Appeals for the Fifth Circuit assumed that both prosecutions involved the "same offense." *United States v. Wittie*, 25 F.3d 250, 255 & n.17 (5th Cir. 1994); (J.A. 145 & n.17). The Fifth Circuit "address[ed] the issues in this case . . . as they were

presented by the parties." *Id.* at 255 n.17; (J.A. 145 n.17). The Court also accepted for purposes of its analysis that Mr. Witte had "been punished by inclusion of the cocaine activities in relevant conduct and proceed[ed] to consider whether a second punishment [was] nonetheless permitted by Congress." *Id.* at 258; (J.A. 154). The Fifth Circuit did this because it failed to recognize the distinction established by this Court's precedent between the imposition of multiple punishments for one offense in a single proceeding and the imposition of such in multiple proceedings. *See id.* at 255 & n.15; (J.A. 144 & n.15) (using *Missouri v. Hunter*, 459 U.S. 359, 367 (1983), and *Albernaz v. United States*, 450 U.S. 333, 344 (1981), to support the statement that legislative intent governs the imposition of multiple punishments for the same offense). Of course, if Congress could legislate an intent to impose multiple punishments for the same offense in multiple proceedings, this would render the Double Jeopardy Clause nugatory. *See Halper*, 490 U.S. at 451 n.10.

The mistaken interpretation of this Court's precedent led the Fifth Circuit to conclude that, "[u]nder § 5G1.3(b), then, Congress allows 'double punishment' for the cocaine offense," and that Mr. Witte, for example, could be sentenced in a second proceeding to an additional 118 months in prison on the basis of that offense. *Wittie*, 25 F.3d at 261; (J.A. 162). In light of the parties' and the court's assumption that the same offense was involved in both prosecutions, however, the court's conclusion clearly is constitutionally wrong. *See Halper*, 490 U.S. at 451 n.10.

Principles of statutory construction, the objectives of the guidelines, and the commentary, language, and examples of section 5G1.3(b) also show that the Fifth Circuit's conclusion was erroneous. Section 5G1.3, which is entitled "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment," states, in part:

> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(b).

The commentary in the guidelines is binding on federal courts, *see Stinson*, 113 S. Ct. at 1919, and the policy statements are authoritative guides to the applicable guidelines. *See Williams*, 112 S. Ct. at 1119. In addition, in interpreting the guidelines, the Court should look first to the language of the guidelines themselves and assume that words are used as they are commonly and ordinarily understood and that their plain meaning is apparent from their terms. *Cf. Moskal v. United States*, 498 U.S. 103, 108 (1990); *Hughey v. United States*, 495 U.S. 411, 415 (1990); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When engaging in statutory construction, moreover, the Court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). A fundamental rule of statutory construction also "requires that statutes are to be construed, if possible, in harmony with the Constitution and other applicable statutes." *Kohler Co. v. Moen Inc.*, 12 F.3d 632, 642 (7th Cir. 1993) (citing *New York v. Ferber*, 458 U.S. 747, 769 & n.24 (1982)). Thus, statutory provisions must be read *in pari materia*. *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993).

The language and the commentary of section 5G1.3 show that the Commission intended the section to apply when all real offenses or relevant conduct had *not* been

punished in an initial sentencing. The commentary to 5G1.3 states that "[e]xcept in the cases in which subsection (a) applies, this guideline is intended to result in an *incremental punishment for the instant offense* that most nearly approximates the sentence that *would have been imposed had all the sentences been imposed at the same time.*" U.S.S.G. § 5G1.3, comment. (backg'd.) (italics deleted; emphasis added). By the express language of the commentary, the Sentencing Commission intends section 5G1.3 to apply when there is a need for incremental punishment. When a defendant is sentenced in accordance with the guidelines in one proceeding for all real offenses, however, there is and should be no need for incremental punishment in a later proceeding. In fact, a second sentencing for all such offenses would contradict the objectives implemented in the first three chapters of the guidelines, which include uniformity, proportionality, and the avoidance of charge manipulation. *See supra* text, at 14-18.

By the express language of the commentary, the Commission also intends section 5G1.3 to achieve a sentence "that most nearly approximates the sentence that *would have* been imposed had all the sentences been imposed at the same time." U.S.S.G. § 5G1.3, comment. (backg'd.) (italics deleted; emphasis added). This presumes that the sentence for all offenses (*i.e.*, the offense of conviction and all relevant conduct, U.S.S.G. § 1B1.1, comment. (n.1(l)), was not imposed at the same time. *See Random House Dictionary of the English Language* 2191 (2d ed. unabridged 1987) (definition 9 of "would": "9. would have, (used with a past participle to express unfulfilled intention or desire)") (emphasis deleted). The presumption does not obtain, however, when the defendant *has been* sentenced for all real offenses in an initial proceeding. Nor would any *approximation* be necessary when the

first proceeding and the second proceeding have the exact same relevant conduct and guidelines.

The language of subsection (b) of 5G1.3, moreover, distinguishes between "offense(s)" from which the undischarged term of imprisonment resulted and "the instant offense." *See* U.S.S.G. § 5G1.3(b). Had the Commission intended to authorize two concurrent punishments in two proceedings for all of the same relevant conduct or real offenses, it would not have used two different terms, but rather would have stated: "If . . . the undischarged term of imprisonment resulted from [the instant offense], . . . the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." This construction of 5G1.3(b) not only sounds odd, but it also conflicts with the purposes and provisions of the first three chapters of the guidelines. *See supra* text, at 14-23. The omission of "instant" from the first part of section 5G1.3(b) and its inclusion in the second part of the section require a presumption that the Commission acted intentionally and purposely in drafting the language. *See Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994).

The distinction between "offense" and "instant offense" is significant in the construction of the phrase, "offense(s) that have been *fully taken into account* in the determination of the offense level for the instant offense." U.S.S.G. § 5G1.3(b) (emphasis added). To "take into account" means to "make allowance for" or to "consider." *See Random House Dictionary of the English Language* 13 (2d ed. unabridged 1987) (definition 19 of "account"). Thus, section 5G1.3(b) applies when the offense level for the instant offense has fully considered the offense(s) that resulted in the undischarged term of incarceration. This implies a relationship between "the instant offense" and the "offense(s)" that is one of inclusion rather than of

equivalence. In sum, the language of section 5G1.3(b) implies that the section applies when the offense from which the undischarged term of imprisonment resulted is fully included in, but not the only determinant of, the offense level for the instant offense.

This construction is supported by the remaining commentary on and example of the proper application of section 5G1.3(b), as well as the design of the guidelines as a whole and their object and policy. *See Crandon*, 494 U.S. at 158. The commentary states that subsection (b) addresses a situation, "for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct." U.S.S.G. § 5G1.3, comment. (n.2) (italics omitted).

The commentary at least makes clear that section 5G1.3(b) applies when two prosecutions are instituted in *two* different jurisdictions, and not one, as occurred in Mr. Witte's case. The commentary, however, refers to "the same criminal conduct or . . . different criminal transactions that were part of the same course of conduct." *Id.* What is unclear is what is meant by "the same criminal conduct." That the Commission did not use the term "same relevant conduct" implies a difference in the scope of the two prosecutions and leaves open to question whether it meant "the same type of criminal conduct," "the same criminal conduct to the same extent," or "the same criminal conduct to a lesser extent."

The only example given in the commentary involves an undischarged sentence that is based upon "the same course of conduct." *Id.* Nevertheless, it confirms that the Commission intended section 5G1.3(b) to apply and to authorize incremental punishment only when the relevant conduct in the second proceeding is greater than

(*i.e.*, takes full account of) the offense that resulted in the undischarged term of incarceration. *Id.* (relevant conduct of 45 grams of cocaine includes 15 grams on which the defendant is imprisoned in state custody). The example confirms that the Commission intended section 5G1.3(b) to apply when all relevant conduct was *not* addressed in the prior sentencing.

Thus, the language and commentary of section 5G1.3 confirm that subsection (b) "applies where a defendant's offense level in a second prosecution is set taking into account conduct that has already been the subject of a conviction and sentencing," in contrast to a case in which the "first conviction and sentencing took into account conduct that is now the subject of the second prosecution." *United States v. McCormick*, 992 F.2d 437, 441 n.3 (2d Cir. 1993). "In the first case, the Commission requires concurrent sentencing in order to avoid multiple punishments." *Id.* Section 5G1.3(b), however, does not cure the imposition of multiple punishment in the second case. *See id.* The two situations do not represent "two sides of the same coin." *Id.* at 443 (Mahoney, J., dissenting). The construction of section 5G1.3(b) that allows a second prosecution and sentencing when all relevant conduct and real offenses have been punished in a prior proceeding would promote charge manipulation, disparity, lack of uniformity, and forum shopping in sentencing, all of which are contrary to the objectives of the Guidelines. *See supra* text, at 14-23. Such a construction must be disfavored. *See Crandon*, 494 U.S. at 158.

In sum, section 5G1.3(b) by its terms, commentary, and example applies to a second sentencing when the first sentencing did not take into account all relevant offense conduct and the second sentencing does. In this manner, the Sentencing Commission, consistent with its objectives, sought to avoid double counting of relevant

conduct. To construe section 5G1.3(b) as authorizing a second prosecution and punishment when the first prosecution and sentencing held the defendant accountable for all relevant conduct and real offenses is to assume that the Sentencing Commission drafted the first three chapters of the guidelines to promote uniformity, real offense sentencing, and proportionality, as well as to prevent charge manipulation, and that it then turned around and created section 5G1.3(b) as a vehicle to defeat and dismantle all that it had accomplished with the first three chapters. Such a construction contradicts the object and policy of the guidelines and their design as a whole. *See Crandon*, 494 U.S. at 158. It also fails to read the first three chapters and the fifth chapter *in pari materia*. *See United States Postal Service*, 986 F.2d at 515. Finally, because the Fifth Circuit's construction of section 5G1.3(b) authorizes violations of the Double Jeopardy Clause, the alternative construction adopted in *McCormick*, 992 F.2d at 441 n.3, is required. Indeed, the Fifth Circuit's construction violates the Double Jeopardy Clause even when two federal districts are involved, for the protections of the clause apply to one sovereign even when two proceedings are in different courts of that sovereign. *See Dixon*, 113 S. Ct. at 2871-72 (White, J., concurring in part and dissenting in part).

Thus, if this case is addressed as it was presented and decided below, on the assumption that the "same offense" was involved in both prosecutions, and if the only issue in this case is whether section 5G1.3(b) authorizes the imposition of an additional 118 months or more of imprisonment in Case No. 92-207 for the cocaine offenses and other real offenses (*e.g.*, conspiring to import fifteen tons of marijuana), the answer is that it does not and cannot. Put simply, Congress cannot constitutionally

legislate punishing someone twice in two separate proceedings for the same offense. If the Court addresses this case beyond its posture in the court below, Mr. Witte offers the following additional arguments.

B. Congress Has Incorporated the Guidelines into the Federal Criminal Code, and a Federal Court Cannot Ignore the Mandate of Congress and the Express Language of the Guidelines in Determining Whether a Defendant Is Being Twice Punished in Separate Proceedings for the Same Offenses.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." *Dixon*, 113 S. Ct. at 2856. The test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Id.*

In *Dixon*, this Court held that the prosecution of Dixon for possession of cocaine with intent to distribute it was barred because he previously had been found guilty of criminal contempt and sentenced for violating his conditions of release, on an unrelated charge, by possessing the cocaine with intent to distribute it. *Id.* at 2857-58. Dixon's conditions of release did not specify that he was not to commit the offense of possessing cocaine with intent to distribute it, but only "specified that he was not to commit 'any criminal offense.' " *Id.* at 2853. At the show cause hearing for criminal contempt, the court

concluded that the government had established beyond a reasonable doubt that Dixon had possessed cocaine with intent to distribute it. *Id.*

In reaching its conclusion that the later prosecution on the drug offense was barred, this Court recognized that, although the statute proscribing the drug offense and the statute authorizing the contempt proceeding literally were different, the judge who had issued the pretrial order of release had "*incorporated* the statutory drug offense into his release order." *Id.* at 2857 (emphasis added). The Court further reasoned that the later attempt to prosecute Dixon for the drug offense resembled "the situation that produced our judgment of double jeopardy in *Harris v. Oklahoma*, 433 U.S. 682 . . . (1977) (per curiam)," in which "a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony." *Dixon*, 113 S. Ct. at 2857 (parallel citation omitted).

Just as the crime of felony murder could not be separated from its elements in *Harris*, in *Dixon* the "crime" of violating a condition of release could not "be abstracted from the 'element' of the violated condition." *Id.* The Court, therefore, concluded that "[t]he *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies." *Id.* Thus, the later prosecution of Dixon was barred under the "same-elements" test. *Id.* at 2858.

Just as the trial court's order of release in *Dixon* incorporated the entire criminal code, so too has Congress incorporated the United States Sentencing Guidelines into each provision of the federal criminal code. *See, e.g., United States v. R.L.C.*, 112 S. Ct. 1329, 1334-39 (1992)

(holding that revised juvenile punishment statute incorporated the maximum guideline term of imprisonment). Congress, in fact, expressly mandated the application of the guidelines for violations of federal law in 18 U.S.C. § 3553(b). *See R.L.C.*, 112 S. Ct. at 1334; *see also Mistretta*, 488 U.S. at 367-68 (guidelines are binding on the courts). Thus, under the revolution wrought by the Sentencing Reform Act, *Burns*, 501 U.S. at 132, federal courts must look to the guidelines to determine the nature and length of a federal sentence. In other words, by act of Congress the guidelines "are a sentencing imperative." *United States v. Davern*, 970 F.2d 1490, 1492 (6th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1289 (1993).

In carrying out its statutory mandate under 28 U.S.C. § 994 to promulgate the guidelines, the Sentencing Commission, as discussed above, adopted modified real offense sentencing to achieve honesty, uniformity, and proportionality in sentencing and to prohibit unfair treatment through count manipulation. *See supra* text, at 14-23. To these ends, the Commission defined "offense" as "*the offense of conviction and all relevant conduct* under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)) (italics deleted; emphasis added). The relevant conduct provisions mandate that a court hold a defendant accountable for "all acts and omissions" committed, aided, abetted or "wilfully caused" by him or her, all jointly undertaken criminal activity, "whether or not charged as a conspiracy," and all acts and omissions grouped under § 3D1.2. *See* U.S.S.G. § 1B1.3(a)(1)-(2); *see also supra* text, at 18-20 (quoting section 1B1.3).

With regard to drug offenses, the guidelines group the offenses on the basis of drug quantity and base the sentence on the total quantity regardless of whether the

defendant was convicted of multiple counts, *see* U.S.S.G. § 3D1.2(d); *see also id.* § 1B1.3(1)(B), comment. (n.3); *supra* text, at 20-23, and section 2D1.1 supplies the base offense level for virtually all drug offenses. *See supra* text, at 21. The guidelines, moreover, have mandated that drug offenses "under 21 U.S.C. §§ 841 and 960 receive identical punishment based on the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense." U.S.S.G. § 2D1.1, comment. (backg'd.). In addition, where "there are multiple transactions or multiple drug types, the quantities are to be added." *Id.* comment. (n.6).

On the mandate of Congress, therefore, the guidelines require that a defendant charged with and convicted of any violation of 21 U.S.C. §§ 841, 846, 952, 960, or 963 have his or her base offense level set on the basis of the total quantity of drugs and that the trial court punish him or her for all real drug offenses committed, regardless of the crime charged or its elements. This incorporation of the guidelines into the provisions of the federal criminal code by express mandate of Congress can no more easily be abstracted from the code than the incorporation of the entire criminal code could be abstracted from the release order in *Dixon*. *See* 113 S. Ct. at 2857.

In sum, to determine the "offenses" for which a defendant was punished, one must look to the offenses for which a defendant was punished pursuant to the guidelines. Under this Court's precedent, if the same offenses previously have been punished in a prior proceeding, then "double jeopardy bars additional punishment." *Dixon*, 113 S. Ct. at 2856. Application of this test to the real offenses punished under the guidelines does no more than to give due recognition to the long-standing

principle that "the substantive power to prescribe crimes and determine punishments is vested with the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). With regard to the imposition of multiple punishments in multiple proceedings, however, it also makes clear that, although Congress can punish multiple offenses in one proceeding, this does not mean that a criminal court can punish those offenses *"yet again." Dixon*, 113 S. Ct. at 2857 (emphasis in original).

Nor is this application of the "same-elements" test at odds with this Court's prior application of the test. For example, in the *single-proceeding context*, the Court has held that the "Blockburger test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333, 340 (1981). In *Albernaz*, the Court found no clear indication of contrary intent and affirmed the imposition of consecutive sentences for violations of 21 U.S.C. §§ 846 and 963.

Of course, prior to the advent of the guidelines, there was no mandate that importation and possession of controlled substances "receive identical punishment based on the quantity of the controlled substance involved," U.S.S.G. § 2D1.1, comment. (backg'd.) (italics deleted), or that where "there are multiple drug transactions or multiple drug types, the quantities are to be added." *Id.* comment. (n.6). Thus, the guidelines clearly have spoken on matters on which the Court could find no direction prior to their promulgation. Left with only the elements of the charged offenses on which to divine congressional intent in the single-proceeding context, the application of the "same-elements" test to the charged offenses unquestionably was the only route of analysis. *See Whalen v.*

United States, 445 U.S. 684, 692 (1980) (noting that Congress rarely specified its intent on concurrent and consecutive sentences). Indeed, the test still should be employed in situations in which a legislature has not mandated mandatory real offense sentencing or otherwise clearly indicated its intent. That is not the situation, however, in which federal courts find themselves after the advent of the guidelines.

Applying the guidelines to *Blockburger v. United States*, 284 U.S. 299 (1932), itself illustrates the radical difference in the punishment of offenses wrought by the Sentencing Reform Act. Blockburger was convicted and sentenced on three counts charging the sale of narcotics. *Id.* at 300. He was sentenced to five years imprisonment and a fine of $2,000 on each count, with the terms of imprisonment to run consecutively. *Id.* The third count of conviction alleged that the same sale charged in the second count of conviction violated a different statute. *Id.* On the second and third counts of conviction, the Court applied the "same-elements" test and found that they were separate offenses. *Id.* at 303-05. Blockburger argued that the consecutive punishment was too harsh because one and the same sale violated two different statutes. *Id.* at 305. This Court's response was that the "plain meaning of the provision is that each offense is subject to the penalty prescribed; if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction." *Id.*

The Sentencing Reform Act is the very "act of Congress" that *Blockburger* foresaw. Under the guidelines, Blockburger's offenses would have been grouped, *see* U.S.S.G. §§ 1B1.3(a)(1)-(2), 2D1.1(c), 3D1.2(b), (d), and his sentence would have been determined on the basis of the total quantity of drugs. *Id.* § 2D1.1(c) & comment. (n.6). The sentences on all counts of conviction then would

have run *concurrently*. *Id.* § 5G1.2(b), (c). To apply the *Blockburger* "same-elements" test to the charged offenses in order to discern for double jeopardy purposes for what and how a defendant is or has been punished under the guidelines not only fails to give effect to the mandate of Congress as implemented by the guidelines, but it also fails to account for how Blockburger himself would have been sentenced fifty-five to sixty years later.

In sum, in determining the offenses for which a defendant has been sentenced, a federal court cannot ignore the mandate of Congress and the express language of the guidelines. Congress and the guidelines mandate that federal courts sentence defendants, especially in drug cases, for the charged offense and other real offenses. As such, the *Blockburger* test must be applied to those offenses, as defined by the guidelines, to determine whether a defendant is being punished twice for them in multiple criminal federal proceedings.

C. Punishing Mr. Witte Again in Case No. 92-207 Is Punishing Him Twice for the Same Offenses in Violation of the Double Jeopardy Clause.

As discussed above, Mr. Witte was punished in Case No. 91-033 for the cocaine offenses and all real offenses because: (1) his base offense level was calculated not on the basis of the offense to which he pleaded guilty, but rather on the basis of the real offense of conspiracy; (2) all real offenses were grouped in arriving at a base offense level of 40; (3) no different punishment would have been imposed had Mr. Witte entered a plea of guilty to all real offenses; and (4) the sentence of 144 months in custody resulted from the Government's motion for a downward departure and its failure to make known to the court any limit it desired on the court's discretion in imposing a particular sentence. *See supra* text, at 23-28.

Mr. Witte's base offense level in Case No. 92-207 "will necessarily be the same" as it was in Case No. 91-033, because relevant conduct is the same in both cases. *Wittie*, 25 F.3d at 261; (J.A. 161). There will be no motion for a departure downward for substantial assistance in the prosecution of Mr. Pokorny, because Mr. Pokorny himself has entered a plea of guilty, has received the benefit of such a motion, and has received a sentence of 192 months in custody. *See* Sentencing, *United States v. Pokorny*, Cr. No. 92-207 (S.D. Tex. filed Oct. 25, 1993) (docket entry 45). Thus, assuming the same or similar adjustments as those made in Case No. 92-207, Mr. Witte again will be sentenced on the basis of an imprisonment range of 292 to 365 months. *See Wittie*, 25 F.3d at 261; (J.A. 162). Although the Fifth Circuit used an example in which Mr. Witte might be sentenced to an additional 118 months in Case No. 92-207, *see Wittie*, 25 F.3d at 261; (J.A. 162); *see also supra* text, at 11 n.5, in reality he faces a potential additional sentence of 191 months, assuming as the Fifth Circuit did, that Mr. Witte will have served thirty months at the time of his sentencing (*i.e.*, 365 less 144 less 30 equals 191).

When the *Blockburger* test is applied to the offenses on which punishment was imposed pursuant to the guidelines in Case No. 91-033 and the offenses on which punishment will be imposed in Case No. 92-207, *see supra* text, at 7, it is apparent that the imposition of additional punishment violates the Double Jeopardy Clause. Mr. Witte will be punished for the same conspiracy and for the same attempted importation and possession of marijuana and cocaine. In addition, in Case No. 91-033, the district court rejected the Government's argument that the real offenses in question constituted "separate agreements and separate offenses," (J.A. 61, 68-69), and the Government did not appeal that ruling. The guarantee of

the Double Jeopardy Clause "serves 'a constitutional policy of finality for the defendant's benefit.' " *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)); *see also Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (rule of collateral estoppel is embodied in the guarantee against double jeopardy). Punishing Mr. Witte again also violates this constitutional guarantee of finality.

On the facts of this case, therefore, punishing Mr. Witte in Case No. 92-207 is punishing him twice for the same offense in violation of the Double Jeopardy Clause. A federal criminal court already has imposed a procedurally complete and final sentence pursuant to the guidelines for the offenses Mr. Witte committed. Mr. Witte was "forced to run the gauntlet once" for his offenses, *Green v. United States*, 355 U.S. 184, 190 (1957), and neither the Government nor Congress can force him to run it again in a second proceeding. *See Halper*, 490 U.S. at 451 n.10. Even if Congress could do so, however, the guidelines, in their approach to the punishment of drug crimes, whether charged or uncharged, express an intention not to create duplicative punishment for persons falling within the overlap of federal drug statutes. *See Ball v. United States*, 470 U.S. 856, 864 (1985). Thus, even a strictly concurrent sentence, if there is such, could not be imposed on Mr. Witte. *Id.* at 748; *see also Ray v. United States*, 481 U.S. 736, 737 (1987) (sentences are not concurrent when liability to pay total assessment rests upon validity of each conviction).

Rooted in the history of Western Civilization, the Double Jeopardy Clause guarantees that "affliction shall not rise up the second time," and it embodies the maxim that "[n]ot even God judges twice for the same act." *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). To inflict upon Mr. Witte an additional ten to

seventeen years in prison for offenses previously punished violates the letter and spirit of the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to affirm the district court's dismissal of the indictment against the Petitioner in Case No. 92-207.

Respectfully submitted,

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas

H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders

440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

**Counsel of Record for Petitioner*

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APPENDIX A

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18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines

issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard

for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

> (1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. – Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an

order. Upon motion of the defendant or the Government, or on its own motion, the court shall –

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases. – Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21

U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961,[1] 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the government has been afforded the opportunity to make a recommendation, that –

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not as organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same

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[1] So in original. Probably should be "960" (section 1010 of the Controlled Substances Import and Export Act is 21 U.S.C. § 960).

course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989, and amended Pub.L. 99-570, Title I, § 1007(b), Oct. 27, 1986, 100 Stat. 3707-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), (17), Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. ___, ___.)

APPENDIX B

APPENDIX B

U.S.S.G. § 1B1.3

§ 1B1.3. **Relevant Conduct (Factors that Determine the Guideline Range)**

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guidelines specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*

2. *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) in furtherance of the jointly undertaken criminal activity; and

(ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by

the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsel, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had

been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and,

therefore, is accountable for the controlled substance in he suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

(1) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a

teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(c) *Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity*

(1) *Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defenant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not*

accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the $800 check).

(2) *Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.*

(3) *Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the*

importation of the single shipment of marihuana).

(4) *Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.*

(5) *Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).*

(6) *Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.*

(7) *Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy*

involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendant T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may

depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

3. *"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.*

As noted above subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on

another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by difference statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

4. *"Harm" includes bodily injury, monetary loss, property damage and any resulting harm.*

5. *If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson; Property Damage by Use of Explosive); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2F1.1 (Fraud and Deceit); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.*

6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1, subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").*

   An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).

7. *In the case of a partially completed offense (e.g., an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).*

8. *For the purpose of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.*

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as prior sentence; see §4A1.2(a)(1).

Note, however, in certain cases, offense conducted associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

9. *"Common scheme or plan" and "same course of conduct" are two closely related concepts.*

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as pat of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature

of the offenses may also be relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required as yearly intervals).

10. *In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.*

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides

for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections(a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e. to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of

the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 3); November 1, 1989 (see Appendix C, amendments 76-78 and 303); November 1, 1990 (see Appendix C, amendment 309); November 1, 1991 (see Appendix C, amendment 389); November 1, 1992 (see Appendix C, amendment 439); November 1, 1994 (see Appendix C, amendment 503).

APPENDIX C

APPENDIX C

U.S.S.G. § 3D1.2

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2F1.1, 2F1.2;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.2, 2G2.1;
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. *Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. See §3D1.1(b).*

2. *The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group "counts involving substantially the same harm."*

3. *Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.*

   When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

   Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. But: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts are not to be grouped together.

4. *Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite*

harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. But: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.

5. *Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it*

constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guidelines for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute "a specific offense characteristic . . . or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to

commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. *Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).*

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The "same general type" of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two

counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

7. *A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.*

8. *A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or*

more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a singe escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct

transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 45); November 1, 1989 (see Appendix C, amendments 121, 253-256, and 303); November 1, 1990 (see Appendix C, amendments 309, 348, and 349); November 1, 1991 (see Appendix C, amendment 417); November 1, 1992 (see Appendix C, amendment 458); November 1, 1993 (see Appendix C, amendment 496).

APPENDIX D

APPENDIX D

U.S.S.G. § 5G1.3

§5G1.3. **Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment**

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instance offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.

Commentary

Application Notes:

1. *Under subsection (a), the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.*

2. *Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.*

   When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six

months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody.

3. *Where the defendant is subject to an undischarged term of imprisonment in circumstances other than those set forth in subsections (a) or (b), subsection (c) applies and the court shall impose a consecutive sentence to the extent necessary to fashion a sentence resulting in a reasonable incremental punishment for the multiple offenses. In some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In such cases, a consecutive sentence is not required. To the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. It is recognized that this determination frequently will require an approximation. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. Where the offense resulting in the undischarged term of imprisonment is a federal offense for which a guideline determination has previously been made, the task will be somewhat more straightforward, although even in such cases a precise determination may not be possible.*

It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. Additionally, this methodology does not, itself, require the court to depart from the guideline range established for the instant federal offense. Rather, this methodology is meant to assist the court in determining the appropriate sentence (e.g., the appropriate point within the applicable guideline range, whether to order the sentence to run concurrently or consecutively to the undischarged term of imprisonment, or whether a departure is warranted). Generally, the court may achieve an appropriate sentence through its determination of an appropriate point within the applicable guideline range for the instant federal offense, combined with its determination of whether that sentence will run concurrently or consecutively to the undischarged term of imprisonment.

Illustrations of the Application of Subsection (c):

(A) The guideline range applicable to the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served ten months on the undischarged term of imprisonment. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

(B) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a

total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant federal offense, the defendant has served three months on the undischarged term of imprisonment. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

(C) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 60 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a 12-month determinate sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would be the greatest sentence imposable without departure for the instant federal offense.*

(D) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served 22 months on the undischarged term of imprisonment. In this case, a sentence of 24 months to be served concurrently with the remainder of the undischarged term*

of imprisonment would be lowest sentence imposable without departure for the instant federal offense.

4. *If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release (in accord with the policy expressed in §§7B1.3 and 7B1.4).*

Background: This guideline provides direction to the court when a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment. See 18 U.S.C. § 3584. Except in the cases in which subsection (a) applies, this guideline is intended to result in an appropriate incremental punishment for the instant offense that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVEN KURT WITTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a court from convicting and sentencing a defendant for an offense solely because the conduct underlying that offense was previously considered, under the Sentencing Guidelines, in determining the defendant's sentence for a separate offense.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	7
Argument:	
I. The indictment in this case does not charge petitioner with the same offense to which he previously pleaded guilty	10
II. The Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct previously taken into account in determining the defendant's sentence for a different offense	13
A. Consideration of uncharged conduct in sentencing a defendant for one offense does not constitute "punishment" for any other offense under the Double Jeopardy Clause	14
B. Nothing in the Sentencing Reform Act or the Sentencing Guidelines changes the constitutional analysis	20
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981)	12
Ashe v. *Swenson*, 397 U.S. 436 (1970)	11
Blockburger v. *United States*, 284 U.S. 299 (1932)	10-11
Brown v. *Ohio*, 432 U.S. 161 (1977)	11
Burns v. *United States*, 501 U.S. 129 (1991)	20
Department of Revenue v. *Kurth Ranch*, 114 S. Ct. 1937 (1994)	18, 19
Gavieres v. *United States*, 220 U.S. 338 (1911)	11
Grady v. *Corbin*, 495 U.S. 508 (1990)	9, 11

Cases—Continued: Page

Graham v. *West Virginia*, 224 U.S. 616 (1912) 17
Gryger v. *Burke*, 334 U.S. 728 (1948) 17
Hamling v. *United States*, 418 U.S. 87 (1974) 26
Harris v. *Oklahoma*, 433 U.S. 682 (1977) 11
Illinois v. *Vitale*, 447 U.S. 410 (1980) 11
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) 18
McDonald v. *Massachusetts*, 180 U.S. 311 (1901) 17
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 15, 16, 18
Mistretta v. *United States*, 488 U.S. 361 (1989) 20
Moore v. *Missouri*, 159 U.S. 673 (1895) 17
Nichols v. *United States*, 114 S. Ct. 1921 (1994) 15, 18
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 13
Oyler v. *Boles*, 368 U.S. 448 (1962) 17
Parke v. *Raley*, 113 S. Ct. 517 (1992) 17
Schiro v. *Farley*, 114 S. Ct. 783 (1994) 15-16
Sekou v. *Blackburn*, 796 F.2d 108 (5th Cir. 1986) 24
Spencer v. *Texas*, 385 U.S. 554 (1967) 17
United States v. *Brown*, 31 F.3d 484 (7th Cir. 1994) 14
United States v. *Cruce*, 21 F.3d 70 (5th Cir. 1994) 14, 24, 27
United States v. *Dixon*, 113 S. Ct. 2849 (1993) 9, 11, 12, 20, 25, 26
Unied States v. *Dunnigan*, 113 S. Ct. 1111 (1993) 16, 23
United States v. *Duarte*, 28 F.3d 47 (7th Cir. 1994) 23
United States v. *Felix*, 112 S. Ct. 1377 (1992) 12, 17
United States v. *Garcia*, 919 F.2d 881 (3d Cir. 1990) 14
United States v. *Grayson*, 438 U.S. 41 (1978) 14
United States v. *Halper*, 490 U.S. 435 (1989) 18
United States v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992) 6, 14
United States v. *Mack*, 938 F.2d 678 (6th Cir. 1991) . 14, 22, 24
United States v. *McCormick*, 992 F.2d 437 (2d Cir. 1993) 6-7, 14
United States v. *McKinley*, 38 F.3d 428 (9th Cir. 1994) ... 14
United States v. *Nyhuis*, 8 F.3d 731 (11th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994) 14

Cases—Continued: Page

United States v. *Shabani*, 115 S. Ct. 382 (1994) 17
United States v. *Soto-Olivas*, 44 F.3d 788 (9th Cir. 1995) 26
United States v. *Tucker*, 404 U.S. 443 (1972) 14
United States v. *Williams*, 935 F.2d 1531 (8th Cir. 1991), cert. denied, 502 U.S. 1101 (1992) 14
United States v. *Wright*, 873 F.2d 437 (1st Cir. 1989) 22
Williams v. *New York*, 337 U.S. 241 (1949) 15, 24
Williams v. *Oklahoma*, 358 U.S. 576 (1959) 6, 15, 16, 23, 24
Winship, In re, 397 U.S. 358 (1970) 18, 26
Wisconsin v. *Mitchell*, 113 S. Ct. 2194 (1993) 14

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 29
Amend. V (Double Jeopardy Clause) ..... *passim*
Amend. VIII 18
Sentencing Reform Act of 1984:
18 U.S.C. 3551-3742 20
18 U.S.C. 3553(a)(4) 21
18 U.S.C. 3553(b) 21
18 U.S.C. 3584-3585 28
18 U.S.C. 3661 14-15
28 U.S.C. 991-998 20
21 U.S.C. 841(a) 3, 8, 11
21 U.S.C. 846 ..... 3, 8, 11
21 U.S.C. 850 14
21 U.S.C. 952(a) 2, 5, 8, 12
21 U.S.C. 963 ..... 2, 5, 8, 12
Sentencing Guidelines:
§ 1B1.1(a) 21
§ 1B1.2(a) 21
§ 1B1.2(b) 21
§ 1B1.3 ..... 5, 21, 25
§ 1B1.3(a)(2) 20, 21-22, 23
§ 1B1.11 29
§ 2D1.1 21
Application Note 6 4

Rules—Continued: Page

Application Note 10 4
§ 5G1.3 ..... 7, 28, 29
Application Note 2 28
Application Note 3 28
§ 5G1.3(b) 26, 27, 28, 29
§ 5G1.3(c) 28
§ 5K1.1 ..... 4, 5, 7

Miscellaneous:

Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 21
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p. 2430 29
pp. 2466-2469 29
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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 137-166) is reported at 25 F.3d 250. The opinion of the district court (J.A. 130-136) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 21, 1994, and was granted on January 6, 1995. J.A. 167. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Southern District of Texas charged petitioner with conspiring to import cocaine and attempting to import cocaine, both in violation of 21 U.S.C. 952(a) and 963. J.A. 82-83. The district court dismissed the indictment on double jeopardy grounds. J.A. 130-136. The court of appeals reversed. J.A. 137-166.

1. a. In August 1989, federal undercover agent Roger Norman discussed with Dennis Mason in Tucson, Arizona, a plan to import 1,000 kilograms of marijuana from Mexico to Houston, Texas. Those discussions ended when Norman failed to provide the requested down payment. Presentence Report (PSR) 2. Norman and Mason resumed negotiations in Houston in June 1990, this time joined by petitioner and Tom Pokorny. Petitioner, Pokorny, and Mason eventually planned to import both 15 tons of marijuana from Mexico and at least 500 kilograms of cocaine from Guatemala, with the two arrangements proceeding simultaneously. Norman was to fly to Mexico and transport the drugs back to the United States. PSR 3-5, 7-8.

In July 1990, the Mexican source for the marijuana indicated that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The next month, Norman was told that the Mexican suppliers were ready to ship 4,400 pounds of marijuana. After learning the location of the airstrip, Norman arranged to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, authorities seized 591 kilograms of cocaine. The following day, Norman told petitioner that the pilots had been unable to land in Mexico because police had arrived at the airstrip. PSR 5-6.

b. Agent Norman next spoke with petitioner on January 25, 1991, when Norman contacted petitioner to ask if he would like to purchase 1,000 pounds of marijuana. Petitioner said that he would call Norman back to tell him whether he could raise the $50,000 down payment. Three days later, petitioner called Norman to say that he had the down payment. Petitioner indicated that he would use a horse trailer purchased earlier and a motor home owned by an acquaintance, Sam Kelly, to transport the marijuana. PSR 6-7; see also J.A. 39-40.

On February 7, 1991, petitioner met Norman in Houston. He told Norman that he could provide only half of the agreed down payment. Norman agreed to accept $25,000 in exchange for 1,000 pounds of marijuana, allowing petitioner three days to obtain the balance. Petitioner showed Norman and other undercover agents the motor home and its various hidden compartments, and the other agents left to load the motor home and the horse trailer. Petitioner and Norman then went to petitioner's hotel room, where petitioner showed Norman the $25,000. PSR 6-7; see also J.A. 40.

The next morning, Norman and another agent met petitioner and Kelly at petitioner's hotel. Petitioner introduced Kelly as the driver of the motor home, and Kelly was taken to a shopping mall where the motor home and trailer were parked. Kelly was arrested after he took possession of the vehicles, which were loaded with marijuana. Petitioner was arrested at his hotel. PSR 6-7; see also J.A. 40-41.

2. In March 1991, a grand jury in the Southern District of Texas returned a two-count indictment against petitioner and Kelly for conspiring and attempting to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 846. J.A. 9-10. The indictment was limited to conduct occurring on or about

January 25 through February 8, 1991. *Ibid.* In February 1992, pursuant to a plea agreement, petitioner pleaded guilty to the attempted possession count. J.A. 11-15, 32-43. Petitioner agreed to cooperate with the government by providing complete and truthful information, and the government agreed to dismiss the conspiracy count and to file a motion under Sentencing Guidelines § 5K1.1 if petitioner's cooperation amounted to substantial assistance. J.A. 14. The government also stipulated at the plea hearing that Kelly actually took possession of only about 375 pounds of marijuana, rather than the 1,000 pounds discussed in the negotiations. J.A. 17-20, 41, 59.

The presentence report determined that petitioner was accountable for a total quantity of drugs equivalent to 232,261.6 kilograms of marijuana. PSR 9. The report arrived at that figure by adding (1) 1,000 pounds (453.6 kilograms) of marijuana that the report found to be involved in the attempted possession offense to which petitioner pleaded guilty; (2) the 15 tons (13,608 kilograms) of marijuana that petitioner, Mason, and Pokorny had planned to import from Mexico in 1990; (3) the 500 kilograms of cocaine (equivalent to 100,000 kilograms of marijuana) that petitioner, Mason, and Pokorny had planned to import from Guatemala in 1991; and (4) the 591 kilograms of cocaine (equivalent to 118,200 kilograms of marijuana) seized at the Mexican airstrip on August 12, 1990. PSR 9; Sentencing Guidelines § 2D1.1, Application Notes 6, 10 (drug equivalencies).

At the sentencing hearing, both petitioner and the government objected to the PSR's quantity determination on the ground that the parties had agreed that the quantity of marijuana involved in the offense was 375 pounds. J.A. 55-56, 59-60, 62, 63-65. Both parties also urged the court to rule that the discussions and activities concerning importation of marijuana and cocaine

in 1990 were not part of the same course of conduct as the 1991 marijuana offense to which petitioner had pleaded guilty, and therefore should not be considered in sentencing for the 1991 offense. J.A. 60-65.

The district court concluded that the 1990 importation offenses were "relevant conduct" under Guidelines § 1B1.3 for the purpose of determining petitioner's sentence with respect to the 1991 possession offense. J.A. 68-69. The court therefore accepted the PSR's aggregation of the quantities of drugs involved in the 1990 and 1991 episodes, resulting in a base offense level of 40. J.A. 68, 80-81; PSR 9. After making offsetting adjustments for an aggravating role in the offense and for acceptance of responsibility, the court determined that petitioner's Guidelines sentencing range was 292-365 months' imprisonment. J.A. 68, 80-81; PSR 9. Granting the government's motion under Guidelines § 5K1.1 based on petitioner's substantial assistance, the court departed downward by 148 months to arrive at a sentence of 144 months' imprisonment. J.A. 57-58, 68, 76, 81. Petitioner filed a notice of appeal, but his appeal was dismissed five months later for failure to file a brief. J.A. 2.

3. In September 1992, another grand jury in the same district returned a two-count indictment against petitioner and Pokorny for conspiring and attempting to import cocaine, in violation of 21 U.S.C. 952(a) and 963.[1] J.A. 82-83. That indictment was limited to conduct occurring on or about August 18, 1989, through August

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[1] The government sought separate indictments for the 1990 and 1991 offenses because it did not view them as part of the same course of conduct, and because at the time of the first indictment it had not yet completed investigation of (or apprehended all participants in) the more complicated 1990 offenses. J.A. 156 n.43; see also J.A. 92. Although both indictments named petitioner, they involved different co-defendants. J.A. 9-10, 82-83.

15, 1990. *Ibid.* Relying on the Double Jeopardy Clause of the Fifth Amendment, petitioner moved to dismiss the indictment on the ground that he had already been punished for the offenses charged, because the quantities of cocaine involved had been included in determining his sentence for the 1991 offense of attempted possession of marijuana. See J.A. 1, 130.

The district court dismissed the indictment. J.A. 130-136. Relying on *United States* v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), the court ruled that "[t]he government cannot be permitted to craft or develop a scheme by which a person may be twice punished." J.A. 135. The court also indicated its agreement with the sentencing court's determination that petitioner's activities in 1990 and 1991 were part of "one common scheme or plan." J.A. 135-136. The court concluded that the indictment was barred by the Double Jeopardy Clause "because it seeks to punish a second time conduct already punished." J.A. 136.

The court of appeals reversed. J.A. 137-166. Relying on *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), the court held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct." J.A. 153. Accordingly, although the quantity of cocaine involved in petitioner's 1990 cocaine importation scheme was considered in determining the sentence for his 1991 marijuana possession offense, the court concluded that petitioner was not punished for his cocaine activities in the first prosecution. The Double Jeopardy Clause therefore did not bar petitioner's later prosecution and punishment for the cocaine offenses. J.A. 153-154. The court disagreed with the holdings in *United States* v. *Koonce*, *supra*, and in *United States* v. *McCormick*, 992 F.2d 437 (2d Cir.

1993), that when a defendant's actions are included as relevant conduct in determining the punishment under the Sentencing Guidelines for one offense, those actions may not form the basis for a later indictment without violating the Double Jeopardy Clause. J.A. 145-150.

Even if consideration of petitioner's cocaine importation activities in determining his sentence for attempted possession of marijuana constituted punishment, the court of appeals concluded that Congress intended petitioner to be subject to additional punishment for the cocaine offenses. J.A. 154-160. The court observed that Guidelines § 5G1.3 contemplates that related offenses will sometimes result in multiple prosecutions, indicating only an intention that the cumulative punishment resulting from separate prosecutions should not normally exceed "that which would have resulted from prosecution and conviction on both counts in a single proceeding." J.A. 158. The court concluded that because the Guidelines authorize imposition of concurrent sentences in separate proceedings in such cases, the punishment imposed in the second prosecution does not violate the Double Jeopardy Clause. J.A. 158-160.[2]

SUMMARY OF ARGUMENT

The Double Jeopardy Clause prohibits successive prosecutions or multiple punishments for "the same offence." U.S. Const. Amend. V. This case does not in-

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[2] The court of appeals rejected petitioner's claim that a concurrent sentence for the second offense could not exceed the sentence for the first offense when the first sentence resulted from a downward departure from the Guidelines sentencing range based on a substantial assistance motion under Guidelines § 5K1.1. J.A. 160-162. The court also rejected petitioner's claim that the indictment should be dismissed on the theory that the government had breached its plea agreement. J.A. 162-165.

volve successive prosecutions for the "same offence," because the statutes, events, and dates involved in the cocaine importation offenses charged in the present indictment differ from those involved in the attempted possession of marijuana offense to which petitioner previously pleaded guilty. Nor does the instant prosecution threaten petitioner with unconstitutional multiple punishment, because petitioner has never before been punished for the offenses set out in the present indictment. Petitioner's "double jeopardy" theory—that the consideration of the conduct charged in the present indictment in formulating his prior sentence "punished" him for that conduct as though it were a separate "offense"—has no support in this Court's cases.

1. Petitioner pleaded guilty in 1992 to a particular crime: attempting to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 846. In sentencing petitioner for that crime, the district court applied the "relevant conduct" provisions of the United States Sentencing Guidelines and took account of certain other criminal conduct, not previously the subject of any criminal charges, that the court attributed to petitioner. Petitioner chose not to appeal that decision.

Federal prosecutors then sought and obtained an indictment charging petitioner with two new and different crimes: conspiring to import, and attempting to import, cocaine into the United States, in each case in violation of 21 U.S.C. 952(a) and 963. In light of the elements of those offenses, this Court's cases make clear that the importation charges at issue do not seek to punish "the same offence" as the attempted possession of marijuana offense to which petitioner previously pleaded guilty. That observation should bring the constitutional double jeopardy analysis to an end.

2. Petitioner nonetheless argues that because the conduct to be proved in support of the indictment in this case was taken into account in determining his sentence for a prior offense, any punishment imposed in this prosecution would necessarily be multiple punishment in violation of the Double Jeopardy Clause. That argument is wrong, because petitioner has never before been "punished" for the "same offence" with which he is now charged. This Court's cases make clear that whatever conduct or characteristics of a defendant are considered in imposing sentence for an offense, the resulting sentence constitutes "punishment" only for the offense of conviction.

The Sentencing Reform Act of 1984 and the Sentencing Guidelines promulgated under it do not change that settled principle. Although the Guidelines formalize and clarify the consideration of uncharged relevant conduct in sentencing an offender, the fact remains that the only offense for which the defendant is being punished within the meaning of the Double Jeopardy Clause is the offense of conviction. The Guidelines' endeavor to systematize prior sentencing practice for the sake of fairness and uniformity does not extend the reach of the constitutional protection against double jeopardy in the manner suggested by petitioner. Indeed, this Court has explicitly rejected a similar "same-conduct" approach to constitutional double jeopardy analysis. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2860 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)). While Congress could have elected to limit the prospect of multiple prosecutions as petitioner suggests, it did not do so. The Sentencing Guidelines explicitly contemplate the existence of such separate prosecutions, and provide guidance for courts imposing sentences in proceedings other than the first.

The Sentencing Guidelines do endeavor to achieve some coordination of sentences in separate prosecutions for offenses involving related "relevant conduct." It is clear, however, that the Guidelines do not prohibit the government from seeking to convict petitioner of any offense for which he has not previously been prosecuted. This case should therefore be remanded for trial. If petitioner is convicted, the district court will be in the best position to consider, in the first instance, what sentence should be imposed as a result of that conviction, in light of the Guidelines and all the circumstances of the case.

ARGUMENT

I. THE INDICTMENT IN THIS CASE DOES NOT CHARGE PETITIONER WITH THE SAME OFFENSE TO WHICH HE PREVIOUSLY PLEADED GUILTY

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In order to bring himself within the protection of the Clause, petitioner must therefore show, at a minimum, that the government has sought to prosecute or punish him twice for "the same offence." See Br. for Amicus Nat'l Ass'n of Criminal Defense Lawyers (NACDL) 11-12 ("The only real issue in this case is * * * whether petitioner was punished in the first case for the 'same offence' [involved in] the instant indictment."). Petitioner cannot make that showing.

When a defendant alleges successive prosecution or punishment for the same underlying conduct, and each prosecution is based on a different statute, this Court applies the rule articulated in *Blockburger* v. *United*

States, 284 U.S. 299, 304 (1932), to determine whether the two proceedings involve the "same offence":

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

As the Court recently reiterated, the *Blockburger* test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993); see also, *e.g.*, *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977); *Gavieres* v. *United States*, 220 U.S. 338, 342 (1911); compare *Grady* v. *Corbin*, 495 U.S. 508 (1990) (overruled by *Dixon*, 113 S. Ct. at 2859-2864).[3]

The offense to which petitioner pleaded guilty and for which he was sentenced in 1992 was attempted possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 846. J.A. 9-10, 74. The offenses charged in the instant indictment are conspiracy to import cocaine and attempted importation of

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[3] The Court has recognized two special rules in the double jeopardy context, neither of which applies in this case. See *Grady* v. *Corbin*, 495 U.S. at 528 (Scalia, J., dissenting). First, a constitutional collateral estoppel principle precludes relitigation, in a subsequent prosecution, of facts necessarily decided in the defendant's favor in a prior criminal case. *Ashe* v. *Swenson*, 397 U.S. 436, 445-446 (1970). Second, certain statutory offenses, such as felony murder, may incorporate other offenses as predicates in such a way as to render the predicate, in effect, a lesser included offense that may not be separately prosecuted under *Blockburger*. See *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam); see also *Grady*, 495 U.S. at 528, 537-538 (Scalia, J., dissenting); *Illinois* v. *Vitale*, 447 U.S. 410, 419-421 (1980).

cocaine, in violation of 21 U.S.C. 952(a) and 963. J.A. 82-83. Those offenses are distinct for purposes of the Double Jeopardy Clause. This Court has made clear that even if two prosecutions are based on the same transaction, a substantive charge and a conspiracy charge involve different elements and are constitutionally different offenses. *United States* v. *Felix*, 112 S. Ct. 1377, 1383-1385 (1992). Likewise, this Court has previously concluded that under the *Blockburger* test, a distribution offense is distinct from an importation offense, even when applied to the same underlying conduct. *Albernaz* v. *United States*, 450 U.S. 333, 339, 344 n.3 (1981). Here, the offenses charged are distinct under *Blockburger*, as well as involving different courses of conduct.[4] Because the *Blockburger* test governs both in the "multiple punishment and multiple prosecution contexts," *Dixon*, 113 S. Ct. at 2856, there is no basis for treating these two prosecutions as involving the same offense.[5]

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[4] As the court of appeals recognized (J.A. 164-165), the acts alleged in support of the present indictment are entirely distinct from the acts underlying petitioner's previous conviction. The latter involved the attempted purchase for distribution, by petitioner and his co-defendant Kelly, of 1,000 pounds of marijuana in early 1991. In this case, by contrast, the government would seek to prove that petitioner and a different co-defendant conspired and attempted to import substantial quantities of marijuana and cocaine from Mexico and Guatemala between mid-1989 and mid-1990. As the court of appeals pointed out (J.A. 165), the two indictments involve different times, locations, parties, objects, and overt acts.

[5] The court of appeals recognized that the two prosecutions at issue here "clearly" involved different offenses. It nonetheless proceeded to consider the case on what it characterized as "both parties' assum[ption] that the 'same offense' element is satisfied" under *Blockburger*. J.A. 145 n.17. The government's brief in the

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PROSECUTION AND PUNISHMENT FOR CRIMINAL CONDUCT PREVIOUSLY TAKEN INTO ACCOUNT IN DETERMINING THE DEFENDANT'S SENTENCE FOR A DIFFERENT OFFENSE

Despite the existence of constitutionally distinct offenses in petitioner's two prosecutions, petitioner (Br. 14-50) and his amicus (NACDL Br. 13-23) contend that petitioner was previously "punished" for the offenses involved in the present prosecution, and that he is therefore protected against further punishment by the Double Jeopardy Clause's prohibition against the imposition of "multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). That constitutional claim must rest on the theory that (i) certain conduct not charged in petitioner's previous prosecution amounts to an "offense" for constitutional purposes; (ii) petitioner was "punished" for that "offense" when that conduct was considered, as "relevant conduct" under the Sentencing Guidelines, in determining the sentence imposed (for the offense of conviction) in the earlier prosecution; and therefore (iii) he cannot now be tried under an indictment that would require the government to prove the conduct underlying that "offense." This Court has consistently held, however, that consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" of the defendant for any "offense"

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court of appeals made no such assumption; indeed, its entire tenor is to the contrary. See, *e.g.*, Gov't C.A. Br. 9 ("Because each statutory provision requires proof of a fact that the other does not, the imposition of consecutive sentences is permissible; likewise, a separate prosecution is not constitutionally barred."); *id.* at 22-24 (citing, *inter alia*, *Albernaz*, *Blockburger*, and *Dixon*).

other than the one of which he was convicted. Nothing in the Sentencing Reform Act or the Guidelines changes that constitutional analysis.[6]

A. Consideration Of Uncharged Conduct In Sentencing A Defendant For One Offense Does Not Constitute "Punishment" For Any Other Offense Under The Double Jeopardy Clause

1. It is well established that a sentencing court may conduct a broad inquiry into a defendant's background, character, and conduct in establishing an appropriate sentence for any offense of which he has been convicted. *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993); *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); 21 U.S.C. 850. Traditionally, "[s]entencing courts have not only taken into consideration a defendant's prior convictions,

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[6] Most courts of appeals that have considered the issue have rejected the theory on which petitioner's argument is based. See, *e.g.*, *United States* v. *Cruce*, 21 F.3d 70, 76-77 (5th Cir. 1994); *United States* v. *Mack*, 938 F.2d 678, 679 (6th Cir. 1991); *United States* v. *Brown*, 31 F.3d 484, 494-496 (7th Cir. 1994); *United States* v. *Williams*, 935 F.2d 1531, 1538 (8th Cir. 1991), cert. denied, 502 U.S. 1101 (1992); *United States* v. *Nyhuis*, 8 F.3d 731, 738-740 (11th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); see also *United States* v. *McKinley*, 38 F.3d 428 (9th Cir. 1994) (declining to reach issue as unripe); *United States* v. *Garcia*, 919 F.2d 881, 885-887 (3d Cir. 1990) (rejecting related arguments, although reserving precise question at issue here). But see *United States* v. *McCormick*, 992 F.2d 437 (2d Cir. 1993); *United States* v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992).

but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior." *Nichols* v. *United States*, 114 S. Ct. 1921, 1928 (1994). In *Williams* v. *New York*, 337 U.S. 241 (1949), this Court upheld a trial court's reliance on evidence of several prior burglaries, with which the defendant had never been charged, in rejecting a jury's recommendation of a life sentence and instead imposing a sentence of death for the murder of which the defendant was convicted. And in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court upheld the use of uncharged conduct connected to the offense of conviction—visible possession of a firearm during its commission—as a statutory factor requiring the imposition of a five-year minimum sentence.

Although the Court has recognized that sentencing courts routinely consider uncharged conduct in sentencing for the offense of conviction, it has never held that the defendant is thereby "punished" for that uncharged conduct as if it were an independent offense. To the contrary, the Court has rejected the claim that the consideration of uncharged conduct at sentencing can support a claim under the Double Jeopardy Clause. In *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), the defendant, after being sentenced to life imprisonment for murder, was separately charged with the kidnapping that led to his victim's death. In imposing a sentence of death for the kidnapping, the second trial court expressly relied on the related murder as a basis for the sentence. *Id.* at 581. Relying on the "obvious fact" that the two offenses of conviction were "entirely distinct," this Court rejected the defendant's contention that consideration of the murder in sentencing for the kidnaping "punished him a second time for the same offense." *Id.* at 584-586. Cf. *Schiro* v. *Farley*, 114 S. Ct. 783, 789-790

(1994) (consideration of conduct underlying a criminal charge of which defendant was acquitted as an aggravating factor in capital sentencing proceeding for a separate offense does not violate double jeopardy). While a court may consider a wide variety of conduct in fashioning an appropriate sentence, it imposes that sentence, and "punishes" the defendant, only for the offense of which the defendant has been convicted in the particular proceeding in which the sentence is imposed. There is therefore no double jeopardy bar to a subsequent prosecution based on the prior consideration of the underlying conduct in a sentencing proceeding for a different offense.

2. Petitioner's theory—that consideration in criminal sentencing of uncharged conduct amounts to "punishment" for that conduct—would have far-reaching and untenable implications.[7] Under petitioner's logic, for example, common sentence enhancements based on prior convictions would impermissibly "punish" the defendant again for the conduct underlying those convictions. This Court, however, has repeatedly held that recidivism statutes do not impose additional punishment for prior offenses in any way that violates the Double Jeopardy

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[7] Petitioner argues (Br. 46) that his theory is not intended to apply to sentencing schemes in which "a legislature has not mandated mandatory real offense sentencing," and on that basis suggests (Br. 29) that it is not inconsistent with *Williams* v. *Oklahoma*, *supra*. See also NACDL Br. 20-21. If petitioner's theory were correct, however, it would logically apply to any sentencing scheme in which uncharged conduct is used to enhance the sentence for the offense of conviction. See also *McMillan*, 477 U.S. at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."); *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993).

Clause. See *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967); *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962); *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912); *McDonald* v. *Massachusetts*, 180 U.S. 311, 313 (1901); *Moore* v. *Missouri*, 159 U.S. 673, 678 (1895); see also *Parke* v. *Raley*, 113 S. Ct. 517, 522 (1992). The Court has explained that the enhanced punishment imposed under recidivist statutes "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger*, 334 U.S. at 732.

Petitioner's theory would also complicate, and probably prevent, most prosecutions for conspiracy after a defendant had previously been convicted of a substantive offense based on the same conduct. Although the gist of a conspiracy is the unlawful agreement, see *United States* v. *Shabani*, 115 S. Ct. 382, 386 (1994), in sentencing for the conspiracy a court would virtually always consider the substantive harms that the defendant and his co-conspirators accomplished. Under petitioner's theory, sentencing for the conspiracy based in part on a previously prosecuted substantive crime would thus result in unconstitutional multiple punishment. This Court, however, recently reaffirmed that the Double Jeopardy Clause does not bar successive prosecutions for substantive and conspiracy offenses growing out of the same conduct. *Felix*, 112 S. Ct. at 1383-1385.

Nor can petitioner's theory be squared with this Court's cases that allow a sentencing court to enhance a sentence based on conduct that has never resulted in a conviction. A criminal penalty may be imposed only after an offense has been established in accordance with "the

procedural safeguards required as incidents of a criminal prosecution," including proof of the underlying facts beyond a reasonable doubt. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167 (1963); see *In re Winship*, 397 U.S. 358, 364 (1970). This Court, however, has upheld the consideration by the sentencing court of uncharged conduct that the judge finds to have occurred under a preponderance-of-the-evidence standard. *McMillan*, 477 U.S. at 84-92; see *Nichols*, 114 S. Ct. at 1927-1928.[8] If petitioner were correct that the enhancement of a sentence based on uncharged conduct resulted in punishing the defendant for that conduct as though it were a separate offense, the lower standard of proof and less rigorous procedural protections applied in criminal sentencing would be constitutionally suspect. Those sentencing procedures are constitutional precisely because a defendant is "punished" only for the offense of which he was convicted.

Petitioner can draw no support from this Court's decisions holding that "punishment" can occasionally be meted out in civil as well as criminal proceedings. See Pet. Br. 32-33; NACDL Br. 3-6, 14. In *United States* v. *Halper*, 490 U.S. 435 (1989), and *Department of Revenue*

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[8] While the Court has noted that it would raise due process concerns if a statute were "tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense," *McMillan*, 477 U.S. at 88, 89-90, the federal Sentencing Guidelines are not vulnerable to that objection, because they simply structure the appropriate sentence within a congressionally defined maximum sentence for the offense of conviction. In any event, such a claim could be raised only as a due process or Eighth Amendment challenge to the sentence resulting in part from consideration of the uncharged conduct—not as a double jeopardy challenge to a subsequent prosecution for a separate offense involving that conduct.

v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court held that, in certain unusual circumstances, a successive proceeding to collect a civil penalty or tax based on an offense for which a defendant has previously been convicted may violate the Double Jeopardy Clause. In *Halper* and *Kurth Ranch*, however, it was conceded or assumed that both of the relevant proceedings involved "the same offence" for double jeopardy purposes. See *Halper*, 490 U.S. at 437-438, 441 & n.4; *Kurth Ranch*, 114 S. Ct. at 1947. That is not true here. Moreover, while *Halper* and *Kurth Ranch* indicate that civil fine or tax proceedings may sometimes result in "punishment," neither decision suggests that the quintessential criminal sanction, imprisonment, may be imposed, in *any* proceeding, for an offense for which the defendant has been neither indicted nor tried.

Finally, petitioner's theory not only is unsupported by this Court's cases, but also would prove unworkable in practice. If, for example, a defendant were first convicted of unlawful possession of a handgun, the sentencing judge might impose a statutory maximum five-year sentence, rather than the fine or lesser sentence otherwise usual for a first offender, on the ground that the defendant obtained the gun for use in a murder.[9] Under petitioner's theory, the defendant could not later be prosecuted or sentenced for the murder, because he would already have suffered "punishment" by consideration of the same conduct in the handgun prosecution. The application of petitioner's view would also require

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[9] This hypothetical is not intended to reflect particular existing federal statutes or applications of the current Sentencing Guidelines. Because petitioner requests judgment on constitutional grounds, the logic of the Court's decision will apply to all state and federal charging and sentencing schemes, now and in the future.

sentencing courts to translate the "acts and omissions" taken into account at a prior sentencing, see Guidelines § 1B1.3(a)(2), into one or more "offenses" that could be compared to the offense charged in a subsequent prosecution. Not only is that inquiry amorphous, it is contrary to this Court's determination that the double jeopardy inquiry should focus on the elements of the charged offenses, rather than on a defendant's underlying conduct. See *United States* v. *Dixon*, 113 S. Ct. at 2864 & n.16 (discussing "confusion" arising from attempts to apply conduct-based, rather than element-based, analysis in double jeopardy context, and returning to the "elements" approach).

B. Nothing In The Sentencing Reform Act Or The Sentencing Guidelines Changes The Constitutional Analysis

Petitioner and his amicus contend that, whatever the correct result in other sentencing contexts, the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, and the Sentencing Guidelines change the double jeopardy analysis. See, *e.g.*, Pet. Br. 14-31, 41-47; NACDL Br. 14-22. While the Act "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns* v. *United States*, 501 U.S. 129, 132 (1991), the revolution was one of sentencing goals, determinacy, and consistency, not one of offense definition or constitutional theory.

1. Before the Act, each district court exercised wide case-by-case discretion in imposing a sentence within the often broad statutory limits defined by Congress for particular offenses. The Act directed the Sentencing Commission to develop comprehensive guidelines to channel that discretion. See *Burns*, 501 U.S. at 132-133; *Mistretta* v. *United States*, 488 U.S. 361, 363-367 (1989). District courts are generally required to impose a

sentence within a Guidelines range resulting from various offense-related and offender-related factors. 18 U.S.C. 3553(a)(4) and (b). The reform was intended primarily "to eliminate the 'unwarranted disparit[ies] and . . . uncertainty' associated with indeterminate sentencing." *Burns*, 501 U.S. at 133 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 49 (1983)).

In fashioning the Sentencing Guidelines, the Sentencing Commission rejected a "pure real offense" sentencing scheme, and instead adopted a "charge offense" system that "contain[s] a significant number of real offense elements."[10] United States Sentencing Comm'n, *Guidelines Manual* Ch. 1, Pt. A, ¶ 4(a) at 4-5 (Nov. 1, 1994) (Policy Statement); see also Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8-12 (1988). Under Guidelines Sections 1B1.1(a) and 1B1.2(a), a defendant's offense of conviction determines the offense guideline that a court must consult. For petitioner's drug importation and distribution offenses, the applicable guideline is Section 2D1.1, which specifies different base offense levels depending on the quantity of drugs involved. Under Sections 1B1.2(b) and 1B1.3, however, the quantity to be used for purposes of Section 2D1.1 must be based on all of the defendant's "relevant conduct," not simply on the conduct underlying the offense of conviction. Section

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[10] A pure "real offense" system bases the sentence on all related conduct in which the defendant engaged, regardless of the elements of the offense of conviction. A pure "charge offense" sentencing system bases the defendant's sentence solely on the conduct satisfying the elements of the offense on which the defendant was convicted. See United States Sentencing Comm'n, *Guidelines Manual* Ch. 1, Pt. A, ¶ 4(a) at 4-5 (Nov. 1, 1994) (Policy Statement).

1B1.3(a)(2) provides that in the case of "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," including all drug offenses, "relevant conduct" generally includes all acts for which the defendant could be held responsible that were "part of the same course of conduct or common scheme or plan as the offense of conviction." A drug defendant's base offense level under Section 2D1.1 therefore reflects the aggregate quantity of drugs involved in the offense of conviction and in any charged or uncharged "relevant conduct."

2. Contrary to petitioner's contentions (Br. 15-31), nothing in the Guidelines scheme suggests that the defendant has been "punished," for double jeopardy purposes, for "relevant conduct" that is included in the calculation of his offense level—any more than he would have been if a pre-Guidelines court had, in its discretion, taken the same uncharged conduct into account in imposing the same sentence for the same offense of conviction. The "relevant conduct" provisions of the Guidelines merely reflect past practice and channel future discretion by recognizing, in a relatively uniform and predictable way, that any offense of conviction is more serious if it represents not an isolated event, but part of a larger pattern of criminal or anti-social conduct. As courts have therefore recognized, "very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.); *United States* v. *Mack*, 938 F.2d 678, 681 (6th Cir. 1991) ("Section 1B1.3 of the Sentencing Guidelines simply memorializes a long standing practice of trial judges."); see also Wilkins & Steer, *Relevant Conduct: The Cornerstone of the*

Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 516 (1990) (Section 1B1.3(a)(2) "simply formalizes the pre-guidelines practice of considering the full range of a defendant's conduct for sentencing purposes, regardless of whether all of such criminal activity was encompassed within counts of conviction.").

Under the Sentencing Guidelines, the presence or absence of related but uncharged criminal conduct often has an objectively measurable effect on a defendant's sentence, while under the prior system it generally did not. The fact that the sentencing process has become more transparent under the Guidelines, however, does not mean that the defendant is now being "punished" for uncharged relevant conduct as though it were a distinct criminal "offense." Nor does the mandatory character of the consideration of relevant conduct alter the determination of whether the defendant is being punished for that conduct. Cf. *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993) (rejecting view that mandatory character of Guidelines enhancement changes applicable constitutional test). As before, a defendant is punished only for the offense of conviction. See, *e.g.*, *United States* v. *Duarte*, 28 F.3d 47, 48 (7th Cir. 1994).[11]

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[11] Petitioner seeks to distinguish (Br. 28-29) this Court's decision in *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), because the judge in *Williams* was not "required" to consider uncharged conduct and because in pre-Guidelines regimes it could be difficult to tell what "weight" was given to uncharged aspects of the defendant's conduct. But petitioner fails to explain why the application of the Double Jeopardy Clause should turn on whether the "punishment" for the uncharged offense was discretionary or mandatory. Nor does he explain why the Clause should not have been applied in *Williams* itself, where the uncharged conduct (a murder) was explicitly considered by the court in imposing a capital sentence. 358 U.S. at 581. Even in non-Guidelines cases, the effect of taking uncharged conduct into account may be both

The Constitution has always permitted prosecution and punishment for previously uncharged criminal conduct, even if some or all of that conduct was considered in determining an earlier sentence for a different offense. It cannot be constitutionally significant whether the earlier consideration took the form of an essentially discretionary sentence enhancement, as in pre-Guidelines cases; an essentially prescribed adjustment to the defendant's base offense level under the Guidelines, as in this case; or a largely or partly discretionary decision to fix the defendant's sentence within a particular Guidelines range.[12]

Petitioner argues (Br. 22) that his interpretation of the Guidelines and double jeopardy analysis under them is necessary to avoid abusive successive prosecutions. There are often valid reasons, however, why related crimes committed by a defendant are not prosecuted in the same proceeding. In some cases, venue for all of the crimes does not lie in the same district. See *Williams* v. *Oklahoma*, 358 U.S. at 578. In other cases, like this one, some charges may be ripe for prosecution before the investigation into others has been completed. See note 1, *supra*. This Court has consistently rejected the view that the Double Jeopardy Clause requires all offenses that are part of the same general criminal transaction to

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explicit and measurable. See, *e.g.*, *Williams* v. *New York*, 337 U.S. at 244 (uncharged burglaries and other sentencing information explicitly used to enhance life sentence to capital punishment).

[12] See, *e.g.*, *Sekou* v. *Blackburn*, 796 F.2d 108, 111 (5th Cir. 1986) (pre-Guidelines); *United States* v. *Cruce*, 21 F.3d at 76-77 (adjustment of base offense level); *United States* v. *Mack*, 938 F.2d at 679 (fixing sentence within Guidelines range).

be prosecuted in the same proceeding. See, *e.g.*, *Dixon*, 113 S. Ct. at 2860, 2863 n.14.[13]

In essence, petitioner argues that the Guidelines' treatment of uncharged conduct in determining the appropriate sentence for an offense of conviction transforms that conduct into an independent "offense" for which the defendant suffers independent "punishment" within the meaning of the Double Jeopardy Clause. The Guidelines, however, have altered only the consistency and transparency, not the substance, of sentencing practice. While it is therefore easier to quantify the impact on a defendant's sentence of specific uncharged conduct under the Guidelines than it was under prior practice, that is not the same as saying that Congress has enlarged or changed the nature of the "offense" for which the defendant has been punished. Indeed, as the Guidelines themselves suggest, sentencing for the offense of conviction simply includes consideration of uncharged "relevant *conduct*." Sentencing Guidelines § 1B1.3 (emphasis added). Attempting to use that conduct, rather than the elements of the offense of conviction, as a basis for double jeopardy analysis would resemble nothing so much as the "same conduct" approach of *Grady* v. *Corbin* that this Court has definitively rejected. *Dixon*, 113 S. Ct. at 2864.[14]

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[13] The Court has also noted that it is not necessary to distort double jeopardy principles to prevent abuses, because the government is surely "deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources." *Dixon*, 113 S. Ct. at 2863 n.15.

[14] Petitioner suggests (Br. 42) that, as a result of the relevant conduct provision of the Guidelines, "Congress [has] incorporated the United States Sentencing Guidelines into each provision of the federal criminal code," so that each statutory criminal offense

3. Of course, Congress could restrict or prohibit prosecution of offenses when the underlying conduct has been previously considered in sentencing for a different offense. Neither the Sentencing Reform Act nor the Guidelines, however, imposes any such restriction. Rather, the Guidelines themselves explicitly contemplate the possibility of separate prosecutions involving the same or overlapping "relevant conduct."

Guidelines § 5G1.3(b) addresses cases in which a defendant who is already in prison is sentenced, in a second case, for another offense committed before his imprisonment began, and in which "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense." Conduct under-

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includes all relevant conduct as well. See also NACDL Br. 18-19. He relies (Pet. Br. 41-43) on an analogy to Justice Scalia's view in *Dixon* that the condition of release the violation of which supported Dixon's conviction for contempt "incorporated the entire governing criminal code." 113 S. Ct. at 2857 (opinion of Scalia, J.). That argument is unsound. First, while the government was required to prove the relevant condition of release to convict Dixon of contempt, the government was not required to prove "relevant conduct" to obtain a conviction of petitioner. "Relevant conduct" is a sentencing factor only. See also *United States* v. *Soto-Olivas*, 44 F.3d 788, 791-792 (9th Cir. 1995) (rejecting argument that revocation of supervised release barred later prosecution for conduct that led to revocation; distinguishing *Dixon*). Second, Congress's reform of sentencing practices did not change the definition of each criminal offense. Indeed, if petitioner were correct, a prosecution for each such newly defined "offense" would require indictment and a jury determination of guilt on each "element" of relevant conduct. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *In re Winship*, *supra*. Those anomalies can be avoided only by rejecting petitioner's premise that the Guidelines' relevant conduct provision has changed the scope of each statutory offense.

lying the first conviction will have been "fully taken into account" in determining the offense level (rather than the criminal history score) applicable to the second conviction only if it is "relevant conduct" with respect to (or the same conduct that underlies) the second conviction. And because the definition of "relevant conduct" is reciprocal, cases to which Section 5G1.3(b) applies because of the "relevant conduct" rules will normally also be cases in which the conduct underlying the second conviction was previously considered as "relevant conduct" in determining the Guidelines sentence for the first conviction—cases, that is, like this one, that petitioner claims should be barred entirely as a matter of double jeopardy.

Thus, as the court of appeals observed, Section 5G1.3(b) "clearly permits a defendant to be prosecuted—and sentenced—in more than one federal proceeding for different criminal offenses that were part of the same course of conduct." J.A. 157 (emphasis omitted). Indeed, the Guidelines commentary specifically notes that Section 5G1.3(b) addresses cases, among others, in which "a defendant is prosecuted in * * * two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct." Thus, while congressional intent does not control the constitutional analysis in this context, it is incorrect to claim that the Sentencing Reform Act or the Guidelines preclude successive federal prosecutions involving "the same criminal conduct or * * * the same course of conduct," or that Congress or the Sentencing Commission contemplated that such prosecutions would be constitutionally barred as a result of applying the Guidelines' "relevant conduct" rules. See, *e.g.*, *United States* v. *Cruce*, 21 F.3d 70, 77 n.11 (5th Cir. 1994).

4. Much of petitioner's argument may be best understood as relevant not to the constitutional permissibility of trial under the present indictment, but to the proper application of the Sentencing Guidelines if he is convicted. See, *e.g.*, Pet. Br. 34-50; NACDL Br. 14-17. Guidelines § 5G1.3 does endeavor to achieve some coordination of sentences imposed in separate prosecutions for different offenses involving the same or related conduct. The present Section 5G1.3(b) provides that where the sentence imposed in a second prosecution takes full account of offenses for which the defendant is already serving an unexpired prison term, the new sentence should run concurrently with the existing sentence. Application Note 2 provides further that a court imposing a second sentence under subsection (b) "should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense." Where subsection (b) does not apply, Section 5G1.3(c) provides for the imposition of consecutive sentences, but only "to the extent necessary to achieve a reasonable incremental punishment." Application Note 3 explains that "[t]o the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence * * * that approximates the total punishment that would have been imposed * * * had all of the * * * sentences [been] imposed at the same time." See also 18 U.S.C. 3584-3585.

The application of Section 5G1.3 to the facts of this case is not ripe for review at this time. First, of course, on remand petitioner might be acquitted, in which case the issue would not arise. Second, if petitioner is convicted, whether subsection (b) or subsection (c) applies at sentencing will depend on whether the sen-

tencing court treats petitioner's attempted possession of marijuana as "relevant conduct" with respect to the present cocaine conspiracy and importation offenses. Finally, as amicus NACDL points out (Br. 8), the version of Section 5G1.3 and its commentary in effect at the time of the offenses charged in the present indictment differs from the present version. See United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 385, at 268 (Nov. 1, 1994); see also Sentencing Guidelines § 1B1.11 (Guidelines in effect at sentencing apply unless application of changes would violate the Ex Post Facto Clause). Moreover, the Sentencing Commission recently sought public comment on alternative possible amendments to Section 5G1.3 and its accompanying commentary. 60 Fed. Reg. 2430, 2465-2469 (1995). Thus, it is not clear what version of Section 5G1.3 would apply at sentencing in this case.

For all these reasons, arguments relating to the proper application of the Sentencing Guidelines in the event that petitioner is convicted under the present indictment are premature. Because petitioner's constitutional claim is without merit, the court of appeals' judgment reinstating the indictment in this case should be affirmed, and the case should be remanded for trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

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In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas
H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders
440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600
**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE COURT SHOULD ADDRESS THIS CASE AS PRESENTED AND DECIDED IN THE FIFTH CIRCUIT AND SHOULD REVERSE THE FIFTH CIRCUIT'S OPINION BECAUSE CONGRESS CANNOT AUTHORIZE THE IMPOSITION OF CUMULATIVE PUNISHMENT FOR ONE OFFENSE IN TWO CRIMINAL PROCEEDINGS 1

II. THE GOVERNMENT'S CATEGORICAL APPROACH TO THE DOUBLE JEOPARDY ANALYSIS IGNORES THIS COURT'S PRECEDENT AND CALLS FOR RESOLUTION OF THE CONSTITUTIONAL QUESTION IN A VACUUM 3

III. HOLDING THAT FURTHER PROSECUTION AND PUNISHMENT OF MR. WITTE VIOLATES THE DOUBLE JEOPARDY CLAUSE WILL NOT HAVE "FAR-REACHING AND UNTENABLE IMPLICATIONS" IF THAT HOLDING IS BASED ON THE FACTS AND OPERATION OF THE GUIDELINES IN THIS CASE 7

A. Holding in Favor of Mr. Witte Does Not Undermine Enhancements for Prior Convictions Under the Guidelines..... 7

B. The Complaint About the Limitation on Obtaining Successive and Additional Punishments Through Manipulating the Charges in the Indictment Is a Complaint About the Commission's Policy Choices and Should Be Addressed to the Commission..... 8

TABLE OF CONTENTS – Continued

Page

C. Problems of Due Process Raised by the Parties at the Sentencing in the First Prosecution Were Abandoned by Failure to Perfect an Appeal and Are Not Presented For Resolution on this Record 11

D. Holding in Favor of Mr. Witte Will Not Result in an "Amorphous Inquiry" into Conduct, and the Guidelines Already Require a Limited Inquiry into Conduct 14

IV. THE GOVERNMENT PROVIDES THE COURT WITH NO AUTHORITY FOR IGNORING THE CLEAR LANGUAGE AND POLICY CHOICES EXPRESSED IN THE GUIDELINES 16

V. THE GUIDELINES DO MORE THAN CHANNEL A COURT'S DISCRETION 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Smith, 490 U.S. 794 (1989) 5

Albernaz v. United States, 450 U.S. 333 (1981) 18

Benton v. Maryland, 395 U.S. 784 (1969) 13

Burns v. United States, 501 U.S. 129 (1991) 16

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 5

Dep't of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994) 2, 3, 4, 5, 13, 18

Hughey v. United States, 495 U.S. 411 (1990) 18

Kinder v. United States, 112 S. Ct. 2290 (1992) 13

Ladner v. Smith, 941 F.2d 356 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1665 (1992) 14

Liparota v. United States, 471 U.S. 419 (1985) 16

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 12

Miller v. Florida, 482 U.S. 423 (1987) 5, 19, 20

Mistretta v. United States, 488 U.S. 361 (1989) 17

Moskal v. United States, 498 U.S. 103 (1990) 18

Payne v. Tennessee, 501 U.S. 808 (1991) 17

Sharpton v. Turner, 964 F.2d 1284 (2d Cir.), *cert. denied*, 113 S. Ct. 494 (1992) 14

United States v. Dixon, 113 S. Ct. 2849 (1993) 9

United States v. Felix, 112 S. Ct. 1377 (1992) 10

United States v. Halper, 490 U.S. 435 (1989) 2, 3, 4, 5, 13, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) 13

United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) 15

United States v. Trujillo, 959 F.2d 1377 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992) 13

United States v. Wittie, 25 F.3d 250 (5th Cir. 1994) ...1, 2

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 6

Whitmore v. Arkansas, 495 U.S. 149 (1990) 6

Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) 16

STATUTES

18 U.S.C. § 3551 16

18 U.S.C. § 3553 16

18 U.S.C. § 3742 16

21 U.S.C. § 841 ..... 10, 17, 19

21 U.S.C. § 960 ..... 10, 17

28 U.S.C. § 991 16

28 U.S.C. § 994 16

28 U.S.C. § 998 16

TABLE OF AUTHORITIES – Continued

Page

SENTENCING GUIDELINES

U.S.S.G. Ch. 1, Pt. 4(a) 9, 14, 17

U.S.S.G. § 1B1.1 ..... 9, 17, 18

U.S.S.G. § 1B1.3 ..... 9, 17, 18

U.S.S.G. § 2D1.1 ..... 9, 10, 17

U.S.S.G. Ch. 3, Pt. D 18

U.S.S.G. § 3D1.2 ..... 9, 17

U.S.S.G. Ch. 4 8

U.S.S.G. § 4A1.2(a)(1) 8

U.S.S.G. § 5G1.3(b) 15

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE COURT SHOULD ADDRESS THIS CASE AS PRESENTED AND DECIDED IN THE FIFTH CIRCUIT AND SHOULD REVERSE THE FIFTH CIRCUIT'S OPINION BECAUSE CONGRESS CANNOT AUTHORIZE THE IMPOSITION OF CUMULATIVE PUNISHMENT FOR ONE OFFENSE IN TWO CRIMINAL PROCEEDINGS.

As stated in the Brief for Petitioner (Br. 33-34), the Court of Appeals for the Fifth Circuit assumed that both prosecutions at issue here involved the "same offense," and it "address[ed] the issues in this case . . . as they were presented by the parties." *United States v. Wittie*, 25 F.3d

250, 255 & n.17 (5th Cir. 1994); (J.A. 145 & n.17). For purposes of its analysis, the court also accepted that Mr. Witte "had been punished by inclusion of the cocaine activities in relevant conduct" in the first prosecution. *Id.* at 258; (J.A. 154). Contrary to the dictates of *Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945, 1948 (1994), and *United States v. Halper*, 490 U.S. 435, 450-51 & n.10 (1989), the court of appeals held that Mr. Witte could be punished for the offense again in a second criminal proceeding, because a second punishment had been authorized by Congress under section 5G1.3(b) of the United States Sentencing Guidelines. *Wittie*, 25 F.3d at 258, 261; (J.A. 154, 162); *see also* Pet. Br. 33-34.

In the Brief for the United States, the Government argues that "there is no basis for treating these two prosecutions as involving the same offense," and that the "government's brief in the court of appeals made no such assumption." Gov't Br. 12 & n. 5. In its opinion, however, the court of appeals did not state whether its conclusion about the assumptions of the parties was based on the briefs or oral arguments of the parties or the facts in or posture of the record. *See Wittie*, 25 F.3d at 255 & n.17; (J.A. 145 & n.17). For example, the court's conclusion could have been based on the unappealed ruling made by the district court during the sentencing in the first prosecution, which rejected the Government's argument that the cocaine transactions and the marijuana transactions were "separate agreements and separate offenses," (J.A. 61, 68-69), and the Government's concession that it was "not now attacking the sentencing court's inclusion of the cocaine as relevant conduct." Gov't C.A. Reply Br. 6.

In any event, no petition for rehearing on the assumption underlying the opinion was filed in the court

of appeals, and the issue was not raised in the petition for writ of certiorari or the Government's brief in response to the petition. Under similar circumstances, this Court refused to address the issue of whether the criminal conviction and the subsequent tax assessment in *Kurth Ranch* involved separate offenses. *See Kurth Ranch,* 114 S. Ct. at 1942 n.9. Instead, the Court addressed the issue as decided in the court below and found a violation of the Double Jeopardy Clause.

As in *Kurth Ranch,* the Court should decide this case in the posture that it was presented and decided in the court below. In its brief, the Government now concedes that "congressional intent does not control the constitutional analysis in this context." Gov't Br. 27. In light of that concession and the posture of the case and the decision in the court of appeals, *Kurth Ranch* and *Halper* control this case. Under the unique circumstances of this case, therefore, the Court should reverse the judgment of the court of appeals and remand with instructions to affirm the district court's dismissal of the indictment.

II. THE GOVERNMENT'S CATEGORICAL APPROACH TO THE DOUBLE JEOPARDY ANALYSIS IGNORES THIS COURT'S PRECEDENT AND CALLS FOR RESOLUTION OF THE CONSTITUTIONAL QUESTION IN A VACUUM.

The Government argues that a person cannot be "punished" for an "offense" in a particular proceeding for double jeopardy purposes unless the offense was the subject of an indictment and conviction. Gov't Br. 14-16. In other words, even if uncharged conduct or an uncharged offense is "considered" or used to impose a

punitive sanction on a person, the person has not been "punished" for the offense for double jeopardy purposes unless the person has been prosecuted explicitly for that offense. *See id.*

This analysis of the multiple punishment protection of the Double Jeopardy Clause ignores this Court's precedent and views the problem in a vacuum without requiring any scrutiny of the rules under which the punishment was imposed or the manner in which the punishment resulted from those rules. First, in *Kurth Ranch* and in *Halper,* which involved civil proceedings, this Court found that the Double Jeopardy Clause's protection against multiple punishments had been violated even though no "offenses" had been indicted and no "punishment" had been imposed on an "offense" of conviction in those proceedings. *See Kurth Ranch,* 114 S. Ct. at 1942-43; *Halper,* 490 U.S. at 504. If the Government's *per se* rule – that "punishment" is imposed only for an "offense" that is the subject of conviction in a proceeding – were applicable to a claim of unconstitutional multiple punishments, the Court could not have found constitutional violations in *Halper* and *Kurth Ranch.* If "punishment" can be imposed for double jeopardy purposes in civil proceedings when no indictment has been filed and no conviction obtained, then "punishment" can be imposed on an "offense" that is not contained in a particular indictment.

Second, the Court specifically rejected a similar argument made by the Government in *Halper.* There, the Government argued for the application of the *per se* rule that "punishment in the relevant sense is meted out only in criminal proceedings." *Halper,* 490 U.S. at 447. The Court rejected this categorical approach to the assessment of the

Double Jeopardy Clause's proscription of multiple punishments, stating: "This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Id.* (footnote omitted).

The Government's categorical approach to the double jeopardy issue in this case similarly seeks to have the Court analyze the issue of multiple punishments without assessing the sanction imposed and the machinery or rules used by the state in imposing the sanction. In fact, the Government's approach is tautological: if the offense was stated in the indictment, then the defendant was punished for it, and if it was not stated in the indictment, then the defendant was not punished for it. In cases challenging the constitutionality of punishments imposed upon citizens, however, the Court has scrutinized carefully the particular rules and systems challenged and the resulting punishments. *See, e.g., Kurth Ranch*, 114 S. Ct. at 1946-48 (reviewing the specific characteristics of the tax imposed); *Halper*, 490 U.S. at 441-49 (analyzing the issue on the facts of the civil penalty before the Court); *Alabama v. Smith*, 490 U.S. 794, 797-801 (1989) (resolving due process issue on specific fact that more information was available after trial than after invalid guilty plea); *Miller v. Florida*, 482 U.S. 423, 429-35 (1987) (analyzing operation of Florida sentencing guidelines to determine ex post facto challenge); *Chaffin v. Stynchcombe*, 412 U.S. 17, 26-28 (1973) (resolving due process issue on specific fact that resentencing followed retrial by a different jury).

Third, the Government's approach also requires the Court to decide the case in a vacuum and reach a resolution that applies in all cases regardless of the sentencing

system. Thus, in various passages in its brief, the Government argues that, because "petitioner requests judgment on constitutional grounds, the logic of the Court's decision will apply to all state and federal charging and sentencing schemes, now and in the future," Gov't Br. 19 n.9, and that petitioner's theory "would logically apply to any sentencing scheme in which uncharged conduct is used to enhance the sentence for the offense of conviction." Gov't Br. 16 n.7.

This Court never has held that decisions on the constitutionality of a particular sentencing scheme as applied to a particular defendant must apply necessarily to all federal and state sentencing schemes "now and in the future" regardless of the facts. Indeed, Article III of the Constitution is to the contrary and requires the Court to decide only "cases" and "controversies" involving the legal rights of persons actually injured. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Government's standard for the resolution of constitutional questions begs the difficult and fact-specific issue in this case: Whether Mr. Witte can be prosecuted and punished yet again for the cocaine offenses when those offenses previously were included in relevant conduct under the United States Sentencing Guidelines. As argued in the Brief for Petitioner, the answer is that he cannot be prosecuted and punished again because he was punished in the first prosecution for all drug offenses and all drug quantities for which he could be punished under federal statutes and the guidelines and that punishment was imposed pursuant to and as mandated by the guidelines. *See* Pet. Br. 26, 28, 31, 47-48. To argue, as the

Government does, that the issue is resolved by the mere fact that the Government placed different language in the two indictments at issue avoids the difficult fact-specific question posed by the interface of the guidelines and the protections of the Double Jeopardy Clause in this case.

III. HOLDING THAT FURTHER PROSECUTION AND PUNISHMENT OF MR. WITTE VIOLATES THE DOUBLE JEOPARDY CLAUSE WILL NOT HAVE "FAR-REACHING AND UNTENABLE IMPLICATIONS" IF THAT HOLDING IS BASED ON THE FACTS AND OPERATION OF THE GUIDELINES IN THIS CASE.

The Government argues that this Court's holding that further prosecution and punishment of Mr. Witte violates the Double Jeopardy Clause "would have far-reaching and untenable implications." Gov't Br. 16-20. Nevertheless, if the Court decides the case on its facts and the application of the guidelines to those facts, no such "far-reaching and untenable implications" will result from a holding in Mr. Witte's favor.

A. Holding in Favor of Mr. Witte Does Not Undermine Enhancements for Prior Convictions under the Guidelines

The Government first argues that a ruling that the Double Jeopardy Clause prohibits further prosecution and punishment would undermine the Court's precedent upholding "common sentence enhancements based on prior convictions." Gov't Br. at 16-17. As explained in the Brief for Petitioner, however, the guidelines specifically address criminal history in a measure distinct from the

base offense level. Pet. Br. 30; *see also* U.S.S.G. Ch. 4. Thus, a holding that Mr. Witte had been punished under the base offense level in the first criminal proceeding for all the offenses that he had committed could not be used to attack the criminal history scoring under the guidelines.

In addition, an argument concerning criminal history scoring under the guidelines that was strictly analogous to Mr. Witte's argument in this case would prevail under the express language of the guidelines. For example, assume that a defendant argued in a second federal prosecution that his criminal history score should not be increased by a prior conviction and sentence because the prior conviction and sentence were imposed for facts and transactions related to the present prosecution. Under the guidelines, the defendant would prevail because "prior sentence" means "any sentence previously imposed . . . for *conduct not* part of the instant offense." U.S.S.G. § 4A1.2(a)(1)(emphasis added). Far from dismantling the use of prior convictions as enhancements under the guidelines, Mr. Witte's position on punishment under the base offense level is, by analogy, in accordance with the express approach of the guidelines.

B. The Complaint About the Limitation on Obtaining Successive and Additional Punishments Through Manipulating the Charges in the Indictment Is a Complaint About the Commission's Policy Choices and Should Be Addressed to the Commission.

The Government next argues that, if the Court finds a double jeopardy violation: (1) this "would also complicate, and probably prevent, most prosecutions for conspiracy after

the defendant had previously been convicted of a substantive offense based on the same conduct," Gov't Br. at 17; (2) there often are valid reasons for not prosecuting related crimes in the same proceeding, such as when venue lies in different districts or an investigation on one crime has not been completed, Gov't Br. at 24; and (3) double jeopardy principles purportedly are not necessary to prevent abuses because "the government is surely 'deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources.' " Gov't Br. 25 n.13 (quoting *United States v. Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993)).

The Government's first argument that it is Mr. Witte's "theory," Gov't Br. 17, that would limit subsequent prosecutions and punishments for conspiracy after conviction for a substantive offense is misguided because it is not Mr. Witte's theory that does so but the express language and operation of the guidelines. The Sentencing Commission, under mandate of Congress, wrote the rules of punishment "with an eye toward eliminating unfair treatment that might flow from count manipulation." U.S.S.G. Ch. 1, Pt. 4(a). The Commission also defined "offense" as "the offense of conviction and all relevant conduct," *id.* § 1B1.1, comment (n.1(l)), and determined that: (1) a defendant is to be punished for all related criminal activity "whether or not charged as a conspiracy," *id.* § 1B1.3(a)(1)(B); (2) related multiple counts are grouped whether or not the defendant is convicted of multiple counts, *id.* § 1B1.3, comment. (n.3); (3) the base offense level is calculated on the total amount of drugs involved in all related offenses, *id.* §§ 2D1.1(c), 3D1.2, comment. (n.4, ex.4), (n.6 & ex.5); and (4) "[o]ffenses under 21

U.S.C. §§ 841 and 960 receive identical punishment." U.S.S.G. § 2D1.1, comment. (backg'd.) (italics deleted).

The Government's complaint that it no longer can repeatedly change the charges in successive indictments and repeatedly punish a defendant for drug offenses involving substantially the same harm, *see* U.S.S.G. § 3D1.2, is a complaint about the policy determinations made by the Sentencing Commission and implemented by the guidelines. To the extent that the Government is asking the Court to interpret the Double Jeopardy Clause to allow it to do again under the new specific rules of punishment what it once did in the absence of those rules, the Government's remedy lies with Congress and the Commission and not in this Court.[1]

In addition, the Government's argument that there often are valid reasons for not prosecuting related crimes in the same proceeding cannot trump the Commission's policy determinations to *punish* all such crimes in one proceeding. Nor is this argument compelling on the facts of this case. Venue did not lie in different districts, and

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[1] Nor does *United States v. Felix*, 112 S. Ct. 1377 (1992), answer the question presented in this case. *Felix* did not raise the issue of whether the defendant was being twice punished in violation of the Double Jeopardy Clause, and the offenses in that case were not subject to punishment under the guidelines. *See id.* at 1379-81 (offenses occurred prior to November 1, 1987, and constitutional challenge was to subsequent prosecution). Thus, the issue presented here concerning the interface between the rules of punishment mandated by the guidelines and the Double Jeopardy Clause's proscription of multiple punishment was not before the Court. Nor were the Commission's specific policy choices and rules regarding punishment of drug offenses present in that case.

the two indictments were filed in the same courthouse. (J.A. 9, 82). With regard to the necessity to keep the facts or agents secret in order to complete further investigation, the Government revealed in the public record all facts and the agents and participants involved in all offenses in the criminal complaint and affidavit it filed at the beginning of the first prosecution. (J.A. 3-8). The prosecutor, moreover, admitted to the district court in the hearing on the motion to dismiss the second prosecution that the Government's evidence against Mr. Witte in the second case was in the Government's possession during the first prosecution. (J.A. 90-91).

Finally, with regard to the press of demands upon prosecutorial and judicial resources limiting successive prosecutions, the district court specifically noted its frustration with the waste of resources resulting from the second prosecution and punishment of Mr. Witte. (J.A. 100-01) ("if all you want is another 50 months or 60 months, why didn't you just get it out of him in the first place?"). Thus, the Government's argument about the crimp on successive prosecutions and punishments is a complaint about the Commission's policy determinations and is not compelling on the facts of this case.

C. Problems of Due Process Raised by the Parties at the Sentencing in the First Prosecution Were Abandoned by Failure to Perfect an Appeal and Are Not Presented for Resolution on this Record.

The Government next argues that barring further punishment of Mr. Witte in this case cannot "be squared with this Court's cases that allow a sentencing court to

enhance a sentence based on conduct that has never resulted in a conviction." Gov't Br. 17. Supposedly, a holding in favor of Mr. Witte would make "constitutionally suspect" the "lower standard of proof and less rigorous procedural protections applied in criminal sentencing." Gov't Br. 18 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 84-92 (1986)).[2]

Questions about the reach of *McMillan* and the proper burden of proof at guideline sentencings are not at issue in this appeal. The Government did argue at Mr. Witte's sentencing in the first prosecution that the charged offense and the cocaine offenses were "separate agreements and separate offenses" and should *not* be punished together. (J.A. 61).[3] Mr. Witte also objected on

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[2] In *McMillan*, this Court held that Pennsylvania's use of the preponderance-of-the-evidence standard in sentencing a defendant to a mandatory minimum sentence within an existing sentencing range did not violate due process because the legislature simply had taken "one factor that has always been considered by sentencing courts to bear on punishment – the instrumentality used in committing a violent felony – and dictated the precise weight to be given that factor if the instrumentality is a firearm." 447 U.S. at 89-90.

[3] Interestingly, at the sentencing, the Government took the position that Mr. Witte should *not* be punished under the first indictment for the cocaine offenses (J.A. 60-62), and at the hearing on the motion to dismiss, it agreed that the proper guideline range for the first indictment was 63 to 78 months, from which the sentencing judge should have departed downward. (J.A. 94-95) (prosecutor's statement at the hearing on the motion to dismiss that the court was "preaching to the choir" that the downward departure was from a sentence that Mr. Witte should not "have received in the first place"). On the Government's position in the district court, Mr. Witte was erroneously punished for the cocaine offenses that should have been punished

the ground that he was being denied due process of law due to the lessened burden of proof. (J.A. 64). Neither party perfected an appeal of the first prosecution, however. The state of the record, therefore, calls for a decision about whether Mr. Witte was previously punished under the guidelines for the cocaine offenses regardless of whether the proper burden of proof was employed at the sentencing in the first prosecution. Certainly, in *Halper* and *Kurth Ranch*, the Court was not required and did not reach out to resolve due process issues in finding a violation of the Double Jeopardy Clause's proscription against multiple punishments. That due process might require a heightened standard of proof when the results of guideline enhancements are extreme is a question that must be resolved by the circuit courts and perhaps this Court in some other case on a different record. *See, e.g., United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992); *United States v. Kikumura*, 918 F.2d 1084, 1102-03 (3d Cir. 1990); *see also Kinder v. United States*, 112 S. Ct. 2290, 2291-92 (1992) (White, J., dissenting from denial of certiorari).

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only on the presentment of a separate indictment. On that position, Mr. Witte should not be punished again because he cannot be placed in jeopardy a second time if he was erroneously placed in jeopardy before. *Cf. Benton v. Maryland*, 395 U.S. 784, 796-97 (1969) (retrial prohibited when prior acquittal resulted from an invalid indictment).

D. Holding in Favor of Mr. Witte Will Not Result in an "Amorphous Inquiry" into Conduct, and the Guidelines Already Require a Limited Inquiry into Conduct.

The Government argues that Mr. Witte's "view would also require sentencing courts to translate 'acts and omissions' taken into account at the prior sentencing . . . into 'offenses' that could be compared to the offense charged in a subsequent prosecution." Gov't Br. 19-20 (citation omitted). This purportedly would be an "amorphous" inquiry. Gov't Br. 20.

The inquiry concerning the instant offense and base offense level required in this or other guidelines cases is not "amorphous" and requires less inquiry into conduct than that required by other provisions of the guidelines. First, because the Commission wrote the guidelines in terms of conduct, any question about punishment will involve at least a limited question about conduct. *See* U.S.S.G. Ch. 1, Pt. A.4(a) (guidelines are description of generic conduct). Second, the presentence report in a federal case summarizes the offense conduct and particularly specifies the "instant offense" for which a defendant is being punished. *See* PSR, para. 35. Thus, there is no problem of attempting to discern the conduct that was prosecuted or punished under the laws of the different states. *See, e.g., Sharpton v. Turner*, 964 F.2d 1284, 1285-86 (2d Cir.), *cert. denied*, 113 S. Ct. 494 (1992); *Ladner v. Smith*, 941 F.2d 356, 358 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1665 (1992).

Third, even the Government in its brief has no problem in this case discerning from the offense conduct

section of the presentence report that Mr. Witte's punishment was determined at least in part on the marijuana and cocaine he "planned to import." Gov't Br. 4; *see also id.* at 5 (speaking of "1990 importation offenses"). Nor does it pose a problem for appellate courts in light of the specific descriptions and summaries in federal presentence reports. *See, e.g., United States v. McCormick*, 992 F.2d 437, 438 (2d Cir. 1993) (affirming dismissal of *only* those counts that previously had been used to determine the defendant's prior sentence). In fact, reading the specific description of the "instant offense" in the presentence report may be the clearest way (if not the only way) to determine specifically for what a defendant has been punished in a prior proceeding under the guidelines.

Finally, section 5G1.3(b) of the guidelines, which the Government embraces, requires much more analysis of conduct underlying offenses than the analysis required by Mr. Witte's position. *See* U.S.S.G. § 5G1.3(b); *see also* Gov't Br. 26-27. To apply section 5G1.3(b) to alleviate any double jeopardy problem resulting from multiple punishment of a prior offense of a less serious nature, *see McCormick*, 992 F.2d at 441 n.3, the sentencing court must set the "offense level in the second prosecution . . . taking into account conduct that already has been the subject of a conviction and sentence." *Id.* This may involve translating conduct underlying even state offenses into federal offenses. *See* U.S.S.G. § 5G1.3, comment. (n.2) (lesser state drug offense converted into federal offense conduct). Because this more complex analysis must be used under the guidelines to prevent a double jeopardy problem under section 5G1.3(b), the relatively simple analysis of reading the specific description of the "instant offense" in a federal presentence report that was prepared previously

will not prove to be an "amorphous inquiry" that will be unmanageable in the district courts in cases such as Mr. Witte's, where *all* offenses previously have been punished.

IV. THE GOVERNMENT PROVIDES THE COURT WITH NO AUTHORITY FOR IGNORING THE CLEAR LANGUAGE AND POLICY CHOICES EXPRESSED IN THE GUIDELINES.

Although the Government acknowledges that the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns v. United States*, 501 U.S. 129, 132 (1991), the Government views the revolution as having no effect on constitutional analysis. Gov't Brief 20; *id.* at 20-27 (arguing that the revolution was one of consistency and transparency only). Whatever the scope of the revolution, Congress mandated the promulgation and application of the United States Sentencing Guidelines, 18 U.S.C. § 3553(b); 28 U.S.C. § 994(a)(1), (2), and the Sentencing Commission expressly stated in the guidelines specific rules and principles governing the punishment of violations of federal criminal law. The Government provides the Court with no authority for ignoring the clear language and policy choices expressed in the guidelines for purposes of the constitutional analysis.

Federal crimes "are solely creatures of statute," *Liparota v. United States*, 471 U.S. 419, 424 (1985), and "the primary responsibility for fixing penalties lies with the legislature." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2200

(1993). The assessment of the harm caused by a defendant's criminal acts plays a significant role in the determination of the punishment to be imposed in Anglo-American jurisprudence in general and under the guidelines in particular. *See Payne v. Tennessee*, 501 U.S. 808, 820 (1991). In the present system of punishment for federal crimes, "Congress prescribed the specific tool – the guidelines system – for the Commission to use in regulating sentencing." *Mistretta v. United States*, 488 U.S. 361, 374 (1989).

The Sentencing Commission explicitly defined "offense" as "the offense of conviction and all relevant conduct under § 1B1.3 (relevant conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)). It wrote the rules of punishment for multi-count convictions "with an eye toward eliminating unfair treatment that might flow from count manipulation," U.S.S.G. Ch. 1, Pt. A.4(a), and to avoid multiple punishment from multi-count convictions involving the same harm or "fungible items," such as "separate drug transactions." *Id.* Pt. A.4(e).

The jointly undertaken criminal activity of a defendant in a drug prosecution is expressly to be used to calculate his base offense level whether or not charged as a conspiracy, and multiple drug counts are to be grouped based on the total quantity of drugs whether or not the defendant is convicted of multiple counts. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.3), 2D1.1(c), 3D1.2(d). Offenses under 21 U.S.C. §§ 841 and 960, moreover, receive identical punishment. U.S.S.G. § 2D1.1, comment. (backg'd.). The express language and policy choices embedded in the guidelines reflect the Commission's attempt "to limit the significance of the formal

charging decision and to prevent multiple punishment for substantially identical offense conduct." U.S.S.G. Ch. 3, Pt. D, intro. comment.

If the questions of for what and how a criminal defendant is to be punished in a single prosecution are determined by the intent of the legislature, *see Albernaz v. United States*, 450 U.S. 333, 337 (1981), the Court should look to the plain language of the guidelines to determine that intent. *Cf. Moskal v. United States*, 498 U.S. 103, 108 (1990). Under that plain language, the "offense" for which Mr. Witte was punished included "the offense of conviction and all relevant conduct." U.S.S.G. § 1B1.1 comment. (n.1(l)). The punishment that attached was based on all harm embodied in his jointly undertaken activity whether charged or uncharged as a conspiracy or otherwise. U.S.S.G. § 1B1.3(a)(1)(B); *id.* comment. (n.3). Having been so punished, Mr. Witte cannot be punished again. *See Kurth Ranch*, 114 S. Ct. at 1498; *Halper*, 490 U.S. at 450-51 & n.10.

The Government asks the Court to ignore the express definition of "offense" and the language and policy choices embedded in the guidelines and to focus on a seemingly metaphysical "independent 'offense' for which a defendant suffers independent 'punishment.' " Gov't Br. 25. The Government's approach is based on the assertion that Congress has not changed "the nature of the 'offense' for which the defendant has been punished." That assertion, however, fails to come to grips with the express language of the guidelines and certainly does not authorize the Court to ignore it. *Cf. Hughey v. United States*, 495 U.S. 411, 422 (1990) (plain language of the statute controls).

V. THE GUIDELINES DO MORE THAN CHANNEL A COURT'S DISCRETION.

Finally, the Government asserts that the guidelines merely "channel . . . discretion" in a "uniform and predictable way." Gov't Br. 22. In *Miller v. Florida*, 482 U.S. 423 (1987), however, the Court rejected a similar argument, finding that Florida's revised sentencing guidelines violated the Ex Post Facto Clause. *Id.* at 432-35. Even though the petitioner might have received the same sentence under the old guidelines, the revised guidelines made the sentence more onerous because they increased the presumptive sentencing range and alleviated the necessity of the trial judge's having to give reasons for his sentence, which would have been a departure under the old guidelines. *Id.* at 432-33. The Court further found that the revised guidelines were not simply " 'guideposts' for use in the exercise of discretion." *Id.* at 435. Rather they "directly and adversely" affected the sentence the petitioner received and "created a high hurdle" that had to be cleared before discretion could be exercised. *Id.*

The Government's argument that the federal guidelines merely channel discretion and do not change "the substance" of sentencing, Gov't Br. 22, 25, flies in the face of the reasoning in *Miller*. The federal guidelines used the cocaine offenses to raise mandatorily Mr. Witte's presumptive range of sentencing to 292 to 365 months. *See* Pet. Br. 9 & n.3. Under the federal sentencing scheme in existence prior to the guidelines, the presumptive minimum sentence would have been five years in prison. 21 U.S.C. § 841(b)(1)(B). To argue that the increase in the presumptive range of sentencing by twenty years merely makes "more transparent" prior sentencing practice,

Gov't Br. 23, contradicts the reasoning of *Miller*, which concluded that such a change "directly and adversely" affects the rights of a defendant. *Miller*, 482 U.S. at 435.

CONCLUSION

For the foregoing reasons and the reasons set out in the Brief for Petitioner, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to affirm the district court's dismissal of the indictment against the Petitioner in Case No. 92-207.

Respectfully submitted,

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas

H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders

440 Louisiana, Suite 310
P. O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

**Counsel of Record for Petitioner*

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No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

SCOTT A. SREBNICK*
1899 South Bayshore Drive
Miami, FL 33133
(305) 285-9019

*Counsel of Record

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 PP

QUESTION PRESENTED

Does punishment for a federal offense violate the Double Jeopardy Clause if that offense was already included within the "relevant conduct" for which the defendant was sentenced under the federal sentencing guidelines as a result of a prior prosecution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE QUESTION WHETHER THE INDICTMENT IN THIS CASE PLACES THE PETITIONER IN JEOPARDY OF A PROHIBITED SECOND PUNISHMENT FOR THE SAME OFFENSE DOES NOT DEPEND ON LEGISLATIVE INTENT 3

II. UNCHARGED OFFENSES WHICH ARE PART OF A DEFENDANT'S "RELEVANT CONDUCT" UNDER THE UNITED STATES SENTENCING GUIDELINES ARE "OFFENSES" FOR PURPOSES OF THE *BLOCKBURGER* DOUBLE JEOPARDY TEST 12

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Abbate v. United States, 359 U.S. 187 (1959) 11

Albernaz v. United States, 450 U.S. 333 (1981) 12

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 9

Ball v. United States, 470 U.S. 856 (1985) 6, 10

Benton v. Maryland, 395 U.S. 784 (1969) 20

Blockburger v. United States, 284 U.S. 299 (1932) 4, 5, 12, 18

Brown v. Ohio, 432 U.S. 161 (1977) 12

Burns v. United States, 501 U.S. 129 (1991) 14

Coker v. Georgia, 433 U.S. 584 (1977) 21

Commissioner of Internal Revenue v. Brown, 380 U.S. 563 (1965) 9

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 114 S.Ct. 1937 (June 6, 1994) 3, 4, 6, 14

Furman v. Georgia, 408 U.S. 238 (1972) 21

Grady v. Corbin, 495 U.S. 508 (1990) 18, 22

Harris v. Oklahoma, 433 U.S. 682 (1977) 19

Missouri v. Hunter, 459 U.S. 359 (1983) 4, 5

North Carolina v. Pearce, 395 U.S. 711 (1969) 4

Ratzlaf v. United States, 510 U.S. ___, 126 L.Ed.2d 615 (Jan. 11, 1994) 8

Ray v. United States, 481 U.S. 736 (1987) 10

Schiro v. Farley, 510 U.S. ___, 127 L.Ed.2d 47 (Jan. 19, 1994) 4

TABLE OF AUTHORITIES – Continued

Page

Smalis v. Pennsylvania, 476 U.S. 140 (1986) 13

Stinson v. United States, 508 U.S. ___, 113 S.Ct. 1913 (May 3, 1993) 8, 11

United States v. Ball, 163 U.S. 662 (1896) 13

United States v. Cruce, 21 F.3d 70 (5th Cir. 1994) 5, 7

United States v. Dixon, 509 U.S. ___, 113 S.Ct. 2849 (June 28, 1993) ..... *passim*

United States v. Felix, 503 U.S. ___, 112 S.Ct. 1377 (March 25, 1992) 20

United States v. Halper, 490 U.S. 435 (1989) 3, 4, 5, 6, 14

United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1695 (1992) 17

United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) 19

United States v. Scott, 437 U.S. 82 (1978) 13

United States v. Wittie, 25 F.3d 250 (5th Cir. 1994) 5, 6, 7, 11, 16

Whalen v. United States, 445 U.S. 684 (1980) 4, 13

Williams v. Oklahoma, 358 U.S. 576 (1959) 20, 21, 22

CONSTITUTION AND STATUTES

U.S. Const. Amdt. 5 ..... *passim*

U.S. Const. Amdt. 14 20

18 U.S.C. §2 5

18 U.S.C. §3013 10

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. §3553(b) 22
18 U.S.C. §3553(f) 9
18 U.S.C. §3584 7
21 U.S.C. §841(a)(1) 5
21 U.S.C. §952(a) 5
21 U.S.C. §963 5

SENTENCING GUIDELINES

U.S.S.G. Ch. 1, Pt. A, ¶4 (p.s.) 14
U.S.S.G. §1B1.1 15
U.S.S.G. §1B1.3 ..... 15, 16, 21, 23
U.S.S.G. §2D1.1 ..... 16, 17
U.S.S.G. §3D1.2(d) 16, 17, 21
U.S.S.G. §4A1.1 22
U.S.S.G. §4A1.2 22
U.S.S.G. §4A1.3 (p.s.) 22
U.S.S.G. §5G1.2 8
U.S.S.G. §5G1.3 ..... 7, 8, 9, 10, 11, 17
U.S.S.G. Manual, appx. C 8

RULES OF PROCEDURE

Sup.Ct.R. 37 1
Fed.R.Crim.P. 32(c)(1) (1994 rev.) 23
Fed.R.Crim.P. 32(c)(3)(D) (pre-1994 vers.) 23

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1 (1988) 15

Wilkins and Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 So.Car.L.Rev. 495 (1990) 15, 22

No. 94-6187

In The

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STEVEN KURT WITTE,

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For The Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to insure the proper administration of criminal justice and to protect individual rights guaranteed by the Bill of Rights. Thus, members of the NACDL have a vital interest in ensuring that the Double Jeopardy Clause of the Fifth Amendment is construed to prevent the government from seeking a second punishment for an offense when it is not satisfied with the sanction obtained in the first proceeding.

SUMMARY OF ARGUMENT

The prosecution of Steven Kurt Witte for a cocaine offense that was already taken into account to enhance his base offense level under the United States Sentencing Guidelines for a prior sentence on a marijuana offense violates his rights under the Double Jeopardy Clause of the Fifth Amendment. The Fifth Circuit panel assumed

that the cocaine offense for which Witte was punished as part of his prior marijuana sentencing was the "same offense" as the cocaine importation offense for which he now faces prosecution. This assumption was in fact correct under this Court's recent decision in *United States v. Dixon*, 509 U.S. ___, 113 S.Ct. 2849 (June 28, 1993). However, the panel incorrectly looked to legislative intent to determine whether a second punishment for the "same offense" constitutes double jeopardy. Since the two offenses were the same, the Double Jeopardy Clause bars any further punishment in a successive proceeding. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937 (June 6, 1994); *United States v. Halper*, 490 U.S. 435, 450 (1989). Legislative intent bears on double jeopardy punishment analysis only when the challenged second punishment is imposed in the same proceeding as the first punishment.

ARGUMENT

I.

THE QUESTION WHETHER THE INDICTMENT IN THIS CASE PLACES THE PETITIONER IN JEOPARDY OF A PROHIBITED SECOND PUNISHMENT FOR THE SAME OFFENSE DOES NOT DEPEND ON LEGISLATIVE INTENT

The Double Jeopardy Clause of the Fifth Amendment provides that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." There are two pertinent components of the Double Jeopardy

Clause; the first protects against a subsequent prosecution for the same offense after acquittal or conviction (the prosecution component), while the second protects against multiple punishments for the same offense (the punishment component). *Schiro v. Farley*, 510 U.S. ___, 127 L.Ed.2d 47, 56 (Jan. 19, 1994); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The two components are treated differently. Multiple prosecutions by the same sovereign for the same offense always constitute double jeopardy. *United States v. Dixon*, 113 S.Ct. at 2856. In this context, the analysis is governed by the "same-elements" test known as the *Blockburger* rule, which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars [both] additional punishment and successive prosecution." *Dixon*, 113 S.Ct. at 2856 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). By contrast, multiple punishments for the same offense may or may not violate the Double Jeopardy Clause. *Missouri v. Hunter*, 459 U.S. 359, 367-68 (1983). Multiple punishments constitute double jeopardy only if they are not authorized by the legislature, *Whalen v. United States*, 445 U.S. 684, 691-92 (1980), *or* if they are imposed in successive proceedings. *Halper*, 490 U.S. at 450; *Kurth Ranch*, 114 S.Ct. at 1948.

The requirement that multiple punishments for the same offense be imposed in a "single proceeding" is a fundamental constitutional principle. *See Kurth Ranch*, 114 S.Ct. at 1948 ("[I]t is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence,' and therefore must be imposed during the first prosecution or not

at all.") (citing *Halper*, 490 U.S. at 440). This "single proceeding" requirement is independent of, and in addition to, the requirement that the multiple punishments be authorized by the legislature. *Halper*, 490 U.S. at 451 n. 10 ("That the Government seeks the civil penalty *in a second proceeding* is critical in triggering the protections of the Double Jeopardy Clause.") (emphasis added).

The Fifth Circuit panel assumed that the cocaine offense for which Witte was, in part, punished in the first (marijuana) proceeding was the "same offence" as the offense for which he is now indicted and would face punishment if convicted in the second proceeding:

> Thus both parties assume that the "same offense" element is satisfied under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). But clearly the statute under which Witte was convicted and the statutes under which he is now indicted proscribe different offenses, i.e., aiding and abetting possession of a controlled substance (21 U.S.C. §841(a)(1); 18 U.S.C. §2) [in the prior case], and conspiring to import, and aiding and abetting in the attempt to import, a controlled substance (21 U.S.C. §§952(a), 963; 18 U.S.C. §2) [in the instant case]. *Cf. Hunter*, 459 U.S. at 367, 103 S.Ct. at 678-79; *United States v. Cruce*, 21 F.3d 70, 75-76 (5th Cir. 1994). *We address the issues in this case, however, as they were presented by the parties.*

United States v. Wittie, 25 F.3d 250, 255 n. 17 (5th Cir. 1994) (emphasis added). The panel then analyzed whether Congress intended to permit multiple punishments for the "same offense." *Wittie*, 25 F.3d at 255 ("If the legislature

intended to impose multiple punishments for the same offense, imposition of such sentences does not violate the Constitution."). The Fifth Circuit panel failed to consider the threshold inquiry: whether the challenged multiple punishments were imposed in a single proceeding. That is, the panel did not address, and perhaps simply overlooked, this Court's decisions in *Kurth Ranch* and *Halper*. Certainly, it did not cite either case.[1] Thus, whether or not multiple punishments of Witte for the same offense were authorized by Congress, the Double Jeopardy Clause bars the second punishment because the government seeks to impose that punishment in a successive proceeding. *See Kurth Ranch*, 114 S.Ct. at 1948 (invalidating a *legislatively-authorized* successive punishment); *Halper*, 490 U.S. at 451 (same).

The Fifth Circuit panel's conclusion that Congress authorized "multiple punishments" for the same offense – in addition to being immaterial to the analysis of a case where the same sovereign seeks a second punishment in a separate proceeding – finds no support in the United States Sentencing Guidelines. Absent evidence to the contrary, it is assumed "that Congress ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, 470 U.S. 856, 861 (1985). The Fifth Circuit panel found that there was clear evidence that Congress intended to permit the punishment

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[1] The Fifth Circuit decided *Wittie* on June 23, 1994. Just 17 days earlier, this Court had reaffirmed the principle, unanimously endorsed in *Halper*, that all punishment for the same offense must be imposed in a "single proceeding." *See Kurth Ranch*, 114 S.Ct. at 1948.

of Witte twice for the same offense. Specifically, the panel held that U.S.S.G. §5G1.3(b) was "authority . . . that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution." *Wittie*, 25 F.3d at 260. Section 5G1.3, in its present version, provides in pertinent part:

> *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment*
>
> (b) If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

The Fifth Circuit panel inferred from this provision that Congress anticipated the imposition of punishment in a second proceeding, and therefore, did not intend to preclude the second proceeding. *Wittie*, 25 F.3d at 260; *see also United States v. Cruce*, 21 F.3d 70, 77 n.11 (5th Cir. 1994). There are several flaws in the Fifth Circuit's analysis.

First, the court below relied for its analysis of "legislative intent" on a provision that did not exist either at the time of the petitioner's offenses, or at the time of his sentencing. Section 5G1.3 of the Guidelines contains the Sentencing Commission's guidance to judges exercising their discretion under 18 U.S.C. §3584(a)-(b) to decide whether to impose a concurrent or consecutive sentence on a defendant who is already imprisoned serving

another sentence.[2] That section has been one of the most frequently amended within the Guidelines Manual, with substantially different versions in effect from November 1, 1987, until 1989, from November 1989 to 1991, from November 1991 to 1992, from November 1992 to 1993, and another since November 1993.

The version looked to by the court below was the November 1993 revision, but in February 1991, when the marijuana offense was committed, as well as in August 1990 when the cocaine offenses were committed, section 5G1.3 of the Guidelines addressed only new offenses committed *while* the defendant was serving a term of imprisonment. *See* U.S.S.G. Manual, appx. C, amend. 385; *see also id.*, amend. 465 (version in effect in July 1992, at time of sentencing). At that time, the question of concurrency in cases such as this petitioner's was addressed only in the Commentary. Commentary, unlike the guidelines themselves (while expressing the Commission's authoritative but nonbinding views concerning the proper application of the Sentencing Reform Act and Guidelines), is not submitted for approval to Congress and therefore cannot be looked to as an expression of "legislative intent." *See Stinson v. United States*, 508 U.S. ___, 123 L.Ed.2d 598, 605-06 (May 3, 1993). At best, the 1993 amendments to U.S.S.G. §5G1.3, as approved by Congress, which is what the court below analyzed, represent subsequent action on the same subject, a shaky basis for inferring legislative intent in any case. *See Ratzlaf v.*

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[2] The Commission's rules with respect to concurrency *vel non* in a single, multi-count case are contained in U.S.S.G. §5G1.2.

United States, 510 U.S. ___, 126 L.Ed.2d 615, 626 n.18 (Jan. 11, 1994).[3]

Even under the current version of §5G1.3, the lower court's conclusion is unpersuasive. This Court has long adhered to the principle that statutes should be construed to avoid untenable distinctions and absurd results whenever possible. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965). Section 5G1.3(b) cannot stand for the broad proposition urged by the Fifth Circuit panel because its acceptance would lead to results that could not have been intended by Congress. Section 5G1.3(b) applies only to a defendant who, at the time of sentencing, is already *subject to an undischarged term of imprisonment;* section 5G1.3(b) has no counterpart in the Guidelines for a defendant, facing a second prosecution, whose prior term of imprisonment for that offense *has been fully served*. If, in the Fifth Circuit's view, §5G1.3(b) is

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[3] Moreover, the most recent expression of congressional intent on this subject points the other way. Specifically, 18 U.S.C. §3553(f), effective September 23, 1994, enables a defendant convicted of a narcotics offense to be sentenced in accordance with the applicable guidelines without regard to any statutory minimum, if the defendant, in addition to satisfying other criteria, discloses to the government "all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." It is inconceivable that Congress intended, on the one hand, to encourage a defendant to provide the government with a full confession about his related "offenses" in exchange for a sentence below the mandatory minimum and, on the other hand, to permit the government to initiate a second prosecution and seek a second punishment for those related offenses.

the sole authority that Congress intended multiple punishments for the same offense on a defendant *subject to an undischarged term of imprisonment*, then there is no authority for the imposition of multiple punishments for the same offense on a defendant whose prior term of imprisonment has been fully served. It is difficult to envision a rationale under which Congress could have intended a defendant serving an undischarged term of imprisonment to suffer the direct and collateral consequences of a second conviction for the same offense conduct already punished, and not have intended the same consequences on a defendant whose term of imprisonment has expired.[4]

That U.S.S.G. §5G1.3(b) is not an expression of congressional intent to authorize multiple punishments for the same offense conduct does not render it superfluous. Section 5G1.3(b) is necessary to deal with those situations when the Double Jeopardy Clause is not implicated, such

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[4] Although the sentencing scheme dictated in §5G1.3(b) might perhaps ensure that the imprisoned defendant who faces multiple punishments would receive a reduction of his guideline for time served and a new term of imprisonment that would run concurrently with his undischarged term of imprisonment, the two sentences would in no event be fully concurrent. *See Ray v. United States*, 481 U.S. 736 (1987) (holding that a defendant who has been sentenced to concurrent prison terms on two counts is not in fact serving "concurrent sentences" because of mandatory imposition of a special assessment per count of conviction pursuant to 18 U.S.C. §3013). Moreover, there are other collateral consequences to a second conviction and punishment. *See Ball v. United States*, 470 U.S. 856, 864-65 (1985) (describing all of the collateral consequences that flow from a second conviction, even if concurrent).

as when separate sovereigns have prosecuted a defendant for the same course of conduct. *See Abbate v. United States*, 359 U.S. 187, 194 (1959) (federal prosecution not barred by prior state prosecution of the same person for same acts). Section 5G1.3 reflects Congress' intent to consolidate punishment, whenever possible, into one unitary analysis, and to accommodate the incongruities that are inevitable when both a state and federal sovereign elect to prosecute an individual for the same conduct. Section 5G1.3(b) is not authority that Congress intended to impose cumulative punishments for the same offense.[5]

The court below accepted the premise that petitioner's present indictment seeks a conviction for the sole purpose of imposing punishment for some of the "same offense[s]" as were penalized by an enormous increase in the sentence imposed on him in the prior case. *Wittie*, 25 F.3d at 255 n. 17. On that premise, the Fifth Circuit panel was bound to affirm the dismissal of the second indictment. The only real issue in this case is the issue summarily disposed of by the Fifth Circuit's assumption: whether petitioner was punished in the first case for the

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[5] To the extent that the Commentary to §5G1.3 now speaks in terms of punishments imposed in "two or more federal jurisdictions," *see* Application Note 2, that Commentary is incompatible with the Double Jeopardy Clause's requirement that multiple punishments be imposed in a single proceeding, conflicts with other provisions of the Guidelines, and is a plainly erroneous reading of that particular guideline. *See Stinson v. United States*, 113 S.Ct. at 1915 (noting that Commentary is not authoritative when "it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

"same offence" as the instant indictment proposed to punish him for again.

II.

UNCHARGED OFFENSES WHICH ARE PART OF A DEFENDANT'S "RELEVANT CONDUCT" UNDER THE UNITED STATES SENTENCING GUIDELINES ARE "OFFENSES" FOR PURPOSES OF THE *BLOCKBURGER* DOUBLE JEOPARDY TEST

The Double Jeopardy Clause speaks in terms of "same offence" rather than "same elements" or "same conduct." *U.S. Const, Amdt 5.* Although the *Blockburger* "same-elements" analysis has "historical roots," *see generally Dixon,* 113 S.Ct. at 2860, that inquiry is just a method to determine congressional intent in defining offenses.

> The *Blockburger* test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.

Albernaz v. United States, 450 U.S. 333, 340 (1981). The double jeopardy guarantee is not a restraint on the ability of the legislature to define offenses; rather, it "serves principally as a restraint on courts and prosecutors." *Brown v. Ohio,* 432 U.S. 161, 165 (1977). In *Brown,* the Court stated:

> The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted

> courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

432 U.S. at 165; *see also Whalen v. United States*, 445 U.S. at 689 ("The power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with Congress.").

The instant case is not, under *Dixon*, a "successive prosecution" for the "same offense" as that for which petitioner was previously *convicted* (*i.e.*, possession of marijuana in Texas in 1991 with intent to distribute). But, under the Guidelines regime, the instant indictment nonetheless charges only *offenses* for which petitioner was previously *punished* (conspiracy and attempt to import cocaine from Guatemala in 1990 during what the judge in the first case found to be the same continuing course of illegal conduct). A prosecution that seeks only prohibited successive punishment must be dismissed on Double Jeopardy grounds, regardless of whether that indictment constitutes a prohibited successive prosecution.[6] The Clause's two protections, while often cognate, are not

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[6] After all, what the Fifth Amendment literally prohibits is precisely the second *jeopardy*, not the second punishment as such. The second indictment of petitioner is therefore barred because that proceeding puts the defendant *in jeopardy of* a second punishment for the same offense. This is the same rationale under which a prosecutorial appeal from a judgment of acquittal is barred – not because the appeal process is itself a second prosecution, but because the end sought by that appeal, a new trial, would be barred by the Double Jeopardy Clause. *See Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986); *United States v. Scott*, 437 U.S. 82 (1978); *United States v. Ball*, 163 U.S. 662 (1896).

always, as this case demonstrates. *Cf. Kurth Ranch*, 114 S.Ct. at 1957 (Scalia, J., dissenting) ("Even if it were thought to be the former, the Double Jeopardy Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred.").[7] As both *Kurth Ranch* and *Halper* show, the protection against successive punishment comes into play when the same sovereign seeks a second time to punish the same criminal offense.

The United States Sentencing Guidelines require judges to punish for offenses in addition to the offense of conviction, implicating the Double Jeopardy Clause in a new way. The Guidelines "revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States*, 501 U.S. 129, 132 (1991). The Guidelines were designed to achieve consistency in sentencing by grouping similar harms and requiring courts to account for similar conduct and punish the aggregate relevant offense conduct in one sentencing proceeding. *See generally* U.S.S.G. Ch. 1, Pt.

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[7] Thus, the punishment prong of double jeopardy protection is not always redundant. A prohibited second punishment may result from a proceeding which is not a prosecution (as in *Kurth Ranch* and *Halper*) or from a prosecution which seeks both permissible and prohibited punishment (such as a hypothetical variation of the instant case, in which Witte is charged not only with the previously-punished cocaine offense, but also with some other offense, properly joined in a single indictment, such as a related money laundering or firearms charge, which had not previously been punished). Concomitantly, a prohibited successive prosecution may exist where there has been no prior punishment, as where the first case ended in acquittal or an unnecessary mistrial.

A, ¶4 (p.s.); Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 8-12 (1988); Wilkins and Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 So.Car.L.Rev. 495 (1990). The Guidelines were written "in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence." U.S.S.G. Ch. 1, Pt. A, ¶4(e) (p.s.). This "modified real offense" approach is aimed at fulfilling one of the stated goals of the Guidelines – the confiscation from prosecutors of the power to manipulate indictments so as to influence sentences arbitrarily. U.S.S.G. Ch. 1, Pt. A, ¶4(a) (p.s.).

Congress sought to achieve these goals by defining the term "offense" in the Guidelines. "Offense means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." *See* Application Note 1(l) to U.S.S.G. §1B1.1. A defendant's base offense level for each "offense" *must* be determined on the basis of the "offense of conviction" *plus* "all relevant conduct," as defined in U.S.S.G. §1B1.3.

> *Relevant Conduct (Factors that Determine the Guideline Range)*
>
> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, *shall* be determined on the basis of the following:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above *that were part of the same course of conduct* or common scheme or plan as the offense of conviction;

U.S.S.G. §1B1.3(a) (emphasis added).

The relevant conduct rules require a district court, in a case such as petitioner's, to punish a defendant for all other "offenses" that are part of the same course of conduct as the offense of conviction. *Wittie*, 25 F.3d at 258. Section 2D1.1 is the guideline for the sentencing of all federal drug offenses involving the "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses);

Attempt or Conspiracy." Under U.S.S.G. §3D1.2(d), all offenses punishable under U.S.S.G. §2D1.1 are to be grouped for purposes of arriving at a single calculation of offense severity based on the aggregate quantity of drugs involved. (The Commentary to §2D1.1 even provides a Drug Equivalency Table that permits the aggregation of quantities of different drugs such as the marijuana and cocaine involved in this case; *see* Application Note 10.)

Thus, the statutory offense charged in an indictment does not circumscribe the full panoply of offenses for which a defendant must be held accountable under the Guidelines. *See also* §5G1.3 (describing a prior sentence as being for "offenses" for which a defendant has not been *convicted* until a subsequent case). When a defendant such as the petitioner is indicted for a federal narcotics offense, he is put in jeopardy, under the United States Sentencing Guidelines, not only for that statutory offense; he is put in jeopardy of punishment for all statutory offenses groupable under §3D1.2(d) and committed in the same course of conduct as that statutory offense, whether or not charged. The Guidelines' approach to punishing defendants for offenses not charged in the indictment represents the Guidelines' " 'real offense' approach to drug crimes based upon the proposition that the amount of punishment inflicted on an accused should depend upon what really transpired as opposed to what was charged." *United States v. Koonce*, 945 F.2d 1145, 1150 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1695 & 1705 (1992).

Dismissal of Witte's second indictment, therefore, is consistent with this Court's recent holding in *United States v. Dixon*, 509 U.S. ___ (1993), in which the Court overruled the "same conduct" test approved in *Grady v.*

Corbin, 495 U.S. 508 (1990). The respondent Dixon was released on bond after being charged with second degree murder. Dixon's release form specified that he was not to commit "any criminal offense" while released on bond. Dixon, however, violated his bond conditions by possessing cocaine with intent to distribute. The trial court ordered Dixon to show cause why he should not be held in contempt for violating his bond conditions. Dixon was also indicted for possession of cocaine with intent to distribute. After Dixon was found guilty of criminal contempt and sentenced to 180 days in jail, he moved to dismiss the cocaine indictment on double jeopardy grounds. 113 S.Ct. at 2853. The trial court dismissed the indictment based on the "same conduct" test announced in *Grady v. Corbin*, and the District of Columbia Court of Appeals affirmed.

Although this Court expressly overruled the *Grady* "same conduct" test, the Court nonetheless held that the prosecution of Dixon for the cocaine offense after conviction of the criminal contempt was barred by the *Blockburger* rule. 113 S.Ct. at 2856-58 (opinion of Scalia and Kennedy, JJ.); *id.* at 2874-75, 2890-91 (opinion of White, Stevens, and Souter, JJ.). The Court so held despite the fact that the elements of contempt of court differ from the elements of cocaine possession under a strict *Blockburger* analysis. *Dixon*, 113 S.Ct. at 2865 (Rehnquist, C.J., with O'Connor and Thomas, JJ., dissenting in part) (expressing view that the majority employed the very conduct-based test it purported to reject). The Court reasoned that the court order violated by Dixon "incorporated the entire governing criminal code," and the Court treated the cocaine offense as a "species of lesser-included offense"

of the entire criminal code, for which the Double Jeopardy Clause bars a successive prosecution. *Dixon*, 113 S.Ct. at 2857; *see also Harris v. Oklahoma*, 433 U.S. 682 (1977) (lesser-included offense may not be prosecuted after prosecution for the greater offense).

The *Dixon* majority was faithful to the *Blockburger* rule by looking beyond the charged contempt offense, not to conduct, but to other offenses necessarily incorporated therein. Just as the court order violated by Dixon incorporated the entire District of Columbia criminal code, every federal offense implicates, for punishment purposes, the entire Federal Sentencing Guidelines scheme, and every federal indictment thus incorporates all offenses that are required to be counted as part of the "relevant conduct" for the offense(s) charged therein. When Witte was indicted for the marijuana possession offense, he was put in jeopardy of punishment for the cocaine importation offense as well; and, when he was convicted of the marijuana offense, he faced mandatory punishment for the cocaine offense.[8] Under the Guidelines scheme, the cocaine importation offense for which Witte now stands indicted was an "also-included offense" for punishment

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[8] While it is true that a defendant cannot be sentenced to a term of imprisonment greater than the statutory maximum of the offense that is charged in the indictment regardless of the relevant conduct, this does not undermine the double jeopardy analysis. The government must live with its charging decisions. The Double Jeopardy Clause should serve as an encouragement to the government to bring all related charges against a defendant in one indictment to the extent possible under other constraints, such as venue. *See United States v. McCormick*, 992 F.2d 437, 441 (2d Cir. 1993).

purposes in the marijuana indictment, just as was the drug charge Dixon faced after his contempt sentence. Witte's sentence on the marijuana offense represents a final determination of the appropriate aggregate federal sentence for all of his related offenses. By now indicting Witte for the cocaine offense, the government is putting Witte twice in jeopardy of punishment for the same offense.[9]

Williams v. Oklahoma, 358 U.S. 576, 584-86 (1959), does not mandate a contrary result. That case was decided a decade before the Double Jeopardy Clause was held fully applicable to the states. *See Benton v. Maryland*, 395 U.S. 784 (1969). *Williams* held that the fundamental fairness protected by the Due Process Clause of the Fourteenth Amendment was not offended by the consideration, at a capital sentencing for kidnaping, of the aggravating factor that the defendant had killed the victim, even though the defendant had previously been prosecuted for that murder in another county and sentenced to life imprisonment. Even if the precedential value of that case is not diminished by the obvious unconstitutionality (under several later cases) of the death penalty that was there

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[9] This conclusion is not foreclosed by *United States v. Felix*, 503 U.S. ___, 112 S.Ct. 1377 (March 25, 1992), wherein the Court held that a subsequent prosecution for conspiracy to manufacture methamphetamine was not barred by a previous conviction for attempt to manufacture the same substance. *Felix* involved offenses that occurred prior to November 1, 1987. It did not involve application of the Guidelines, which redefined the punishment scheme, *requiring* "offenses" other than those charged in the indictment to be included in the punishment calculation.

imposed and affirmed,[10] the case is readily distinguishable because it concerned a fully discretionary sentencing scheme. The judge was authorized, but not required, to consider any and all mitigating and/or aggravating factors (including the death of the victim at the hands of the defendant) to determine the proper punishment (within a range of ten years' imprisonment to death) for the kidnaping. The death sentence could fairly be described as being for aggravated kidnaping and not for murder. Here, by contrast, the Guidelines explicitly treat the prior cocaine offense not as an aggravating circumstance of petitioner's subsequent marijuana violation, but as an additional offense – labeled as such – to be punished on that occasion,[11] simply because it met the two criteria for inclusion as "relevant conduct" (it would have been groupable under §3D1.2(d) had it been charged, and it occurred as part of the same course of conduct).

In federal guidelines sentencing, a defendant's other criminal offenses, when they constitute "relevant conduct" under U.S.S.G. §1B1.3, are not treated as an aggravating factor that helps to measure the relative seriousness of the present offense. Nor are they used as a measure of the defendant's dangerousness and risk of recidivism, or as a sign that this defendant may need harsher punishment to deter him or her from future crimes. Those legitimate, traditional sentencing factors, which validated the kind of sentence imposed in *Williams*

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[10] *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977).

[11] This analysis also distinguishes the many cases upholding recidivist increments against double jeopardy challenges.

and other pre-Guidelines cases, are accounted for under the Guidelines by different rules. Aggravating circumstances that are thought to warrant higher sentences are set forth as "specific offense characteristics" under particular guidelines in Chapter 2 of the Manual, or as "victim-related adjustments" under Chapter 3A. If perchance a particular aggravating circumstance (such as the death of the kidnap victim in *Williams*) is not covered by one of those provisions, an upward departure under 18 U.S.C. §3553(b) and Chapter 5K may be warranted.

Likewise, U.S.S.G. §4A1.1 and §4A1.2 define a "criminal history category" that drives the punishment upward for those with prior convictions. And for defendants whose prior criminal conduct has not resulted in convictions, a policy statement at U.S.S.G. §4A1.3 suggests an upward departure if the conviction record understates the seriousness of a defendant's true prior record. The "relevant conduct" rule, on the other hand, represents a considered compromise between "conviction offense" and "real offense" sentencing. *See* Wilkins and Steer, *supra*. Under this regime, the defendant is deliberately *punished* for offenses other than the offense of conviction, so long as those other offenses are related to the conviction offense in defined ways and the total punishment falls within the (usually generous) range provided by the legislatively-defined maximum for the conviction offense. The Double Jeopardy Clause therefore must be construed to protect that defendant from being punished again, in a separate proceeding brought by the same sovereign, for those same offenses.

The position urged by amicus curiae herein is based on offenses, not conduct, and as such, is not the reincarnation of *Grady v. Corbin*. Nor will the proposed double

jeopardy analysis prove to be "unstable in application." *Dixon*, 113 S.Ct. at 2863. A district court is required under §1B1.3 to make particularized findings regarding relevant conduct. The other "conduct" to be punished must be a related criminal "offense." A defendant's presentence report will describe the uncharged offenses relied on by the district court to impose sentence in the first prosecution, and if contested, findings under Fed.R.Crim.P. 32(c)(1) (formerly (c)(3)(D)) will have to be made. Thus, federal courts evaluating double jeopardy claims of this kind will experience little if any difficulty in determining what offenses were previously punished as part of the relevant conduct in a prior sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SCOTT A. SREBNICK*
1899 South Bayshore Drive
Miami, FL 33133
(305) 285-9019

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Amicus Curiae

*Counsel of Record

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